

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1902

No. 150

J. K. MULLEN AND CHARLES D. McPHER, PLAINTIFFS
IN ERROR,

VS.

THE WESTERN UNION REEF COMPANY

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

FILED AUGUST 20, 1907

(16,654.)

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(16,654.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 153.

J. K. MULLEN AND CHARLES D. McPHEE, PLAINTIFFS
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THE WESTERN UNION BEEF COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF COLORADO.

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a UNITED STATES OF AMERICA, ss :

J. K. MULLEN and CHARLES D. MCPHEE,
Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF COMPANY, De-
fendant in Error.

} Writ of Error to the
Court of Appeals of
the State of Colo-
rado.

The President of the United States of America to the honorable judges of the court of appeals of the State of Colorado, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. K. Mullen and Charles D. McPhee and The Western Union Beef Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or com-

b mission, a manifest error hath happened, to the great damage of the said J. K. Mullen and the said Charles D. McPhee, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-ninth day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, — of the said Supreme Court, the 29th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal United States Circuit Court District of Colorado.]

ROBERT BAILEY,
*Clerk of the Circuit Court of the United
States for the District of Colorado.*

Allowed by—

CHARLES I. THOMSON,
President Judge.

c

Return.

THE UNITED STATES OF AMERICA, } ss:
State of Colorado,

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, as far as indicated by the præcipe filed.

Witness my hand and the seal of said court of appeals, at Denver, in said State, this — day of July, A. D. 1897.

JAMES PERCHARD, *Clerk.*

d [Endorsed:] 1200. In the Supreme Court of the United States. J. K. Mullem & Chas. D. McPhee, plaintiffs in error, vs. The Western Union Beef Co., defendant in error. Writ of error to the court of appeals of the State of Colorado. Filed in court of appeals this 30th day of June, A. D. 1897. James Perchard, clerk. William C. Kingsley, Victor A. Elliott, attorneys for pl'ffs in error.

e STATE OF COLORADO:

In the Court of Appeals.

Pleas before the honorable court of appeals of the State of Colorado on the 14th day of June, A. D. 1897, the same being one of the juridical days of the April, A. D. 1897, term of said court of appeals.

Present: Honorable Chas. I. Thomson, president judge.

" Julius B. Bissell, } judges.
 " Adair Wilson, }

James Perchard, clerk.

John A. Murray, bailiff.

f Be it remembered that heretofore and on, to wit, December 2nd, A. D. 1895, came J. K. Mullen and Chas. D. McPhee, copartners, doing business as the Weld County Land & Cattle Company, and filed in this court of appeals their transcript of the record proceedings, as also the bill of exceptions, upon writ of error to the district court of Arapahoe county in a certain cause therein, wherein the said J. K. Mullen and Chas. D. McPhee, copartners, were plaintiffs and The Western Union Beef Company (a corporation) was defendant, the portions of said transcript as indicated by præcipe filed herein to be certified to the honorable Supreme Court of the United States being in words and figures as follows, to wit:

g And afterwards and on, to wit, the 14th day of June, A. D. 1897, the same being one of the April, A. D. 1897, term of our court of appeals, the following proceedings were had and entered of record in said cause, to wit:

J. K. MULLEN and CHARLES D. MCPHEE,	} No. 1200. Error to the
Copartners, etc., Plaintiffs in Error,	
vs.	
THE WESTERN UNION BEEF COMPANY,	} District Court of
Defendant in Error.	

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Arapahoe as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said defendant in error do have and recover of and from said plaintiffs in error its costs in this behalf expended, to be taxed, and that it have execution therefor; and let the opinion of the court filed herein be recorded.

And on the same day as last aforesaid our said court of appeals filed in the office of the clerk of this court its opinion in words and figures as follows, to wit:

J. K. MULLEN and CHARLES D. MCPHEE, Co-	} No. 1200.
partners, etc., Plaintiffs in Error,	
vs.	
THE WESTERN UNION BEEF COMPANY, Defendant in	} Error.
Error.	

Error to the district court of Arapahoe county.

Mr. William C. Kingsley, Mr. Victor A. Elliott, for plaintiffs in error.

Messrs. Thomas, Bryant & Lee, for defendant in error.

THOMSON, P. J.:

This action was brought by the plaintiffs in error against the defendant in error to recover damages for loss of stock occasioned by the communication from cattle of the defendant to cattle of the plaintiff of the disease known as splenetic or Texas fever. The defendant had judgment, and the plaintiff has brought the case here by writ of error.

The complaint charges that about the 15th day of June, 1891, the defendant negligently, wrongfully, and unlawfully shipped from Kimble county, Texas, a large number of Texas cattle infected with Texas fever, and wrongfully, negligently, and

unlawfully unloaded them and turned them loose in the vicinity of a herd of the plaintiffs' cattle, in Logan county, Colorado, and permitted them to run at large upon the range occupied by the plaintiffs' cattle, and to come in contact and become mingled with the plaintiffs' cattle, in violation of the quarantine rules, regulations, and orders of the United States Department of Agriculture and in violation of the quarantine rules, regulations, and orders of the State of Colorado; by reason whereof the plaintiffs' cattle, which had been sound and healthy, became infected with Texas fever and large numbers of them died. A demurrer to the complaint was overruled and the defendant filed an answer, which was, in so far as we care to consider it, a denial of the averments of the complaint.

The cause of action, as alleged in the complaint, was the loss of cattle of the plaintiffs, occasioned by the communication to them of Texas fever by cattle of the defendant imported into Colorado and suffered to run at large, in violation of the quarantine rules and regulations of the Department of Agriculture and in violation of the quarantine rules and regulations of the State of Colorado. The negligence complained of was alleged to consist in these violations. The case was tried below, and is argued here upon the theory that

if the loss of the plaintiffs' cattle was in consequence of disease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe; so that no question of negligence generally in the shipment and management of the cattle is presented by the record. We may dismiss the question of violation by the defendant of the quarantine rules and regulations of the State of Colorado by saying that, upon sufficient evidence, it was settled by the jury in the defendant's favor.

The plaintiffs introduced in evidence an order issued by Hon. J. M. Rusk, the Secretary of Agriculture, as follows:

"Regulations Concerning Cattle Transportation.

UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February 5th, 1891.*

To the managers and agents of railroad and transportation companies of the United States, stockmen and others:

In accordance with section 7 of the act of Congress approved May 29th, 1884, entitled 'An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals,' and of the act of Congress approved July 14th, 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30th, 1891, you are notified that a contagious and infectious disease known as splenic or southern fever exists among cattle in the following-described area of the United States: * * * From the 15th day of February to the

1st day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations."

Here follows a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts, the purpose of which was apparently to prevent healthy cattle from coming in contact with the infection.

The plaintiffs then produced the following further order of the Secretary of Agriculture:

"UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April 23d, 1891.*

Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described may be moved from said area by rail into the States of Colorado, Wyoming, and Montana for grazing purposes, in accordance with the regulations made by said States for the admission of southern cattle thereto.

Provided:

1. That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1891.

m 2. That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5th, 1891.

4. That the State authorities of the States of Colorado, Wyoming, and Montana agree to enforce these provisions."

The territory described in both orders includes that from which the defendant's cattle were shipped, and it is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which was claimed to have been violated by the defendant. It may be conceded, for the purposes of the case, that rules or regulations made by the direction of a statute have the authority of the statute itself, and that their violation is in effect a violation of the statute; but that such may be the case they must be clearly within its terms. The effect to be given to the foregoing orders is dependent upon the provisions of the act referred to in the order of February 5 (23 U. S. Statutes at Large, p. 31). By section 2 the Commissioner of Agriculture was empowered to appoint agents, whose duty it should be, under his instructions, to examine and report upon the means to be adopted for the suppression and extirpation of pleuro-pneumonia, and to provide against the spread, among animals, of other dangerous contagious and infectious diseases. Section 3 made

n

it his duty to prepare such rules and regulations as he might deem proper for the speedy and effectual suppression and extirpation of the diseases referred to, and to certify such rules and regulations to the executive authority of each State and Territory and invite such authority to co operate in the execution and enforcement of the act, authorizing him, upon the acceptance by any State or Territory wherein such disease should be declared to exist, of his plans and methods, or upon the acceptance by him of plans or methods adopted for the same purpose by any such State or Territory, to expend so much of the money appropriated by the act as might be necessary to prevent the spread of such diseases from one State or Territory into another.

Section 4 required him to make special investigation as to the existence of any of the diseases along the dividing lines between United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock were exported, and report the result of his investigation to the Secretary of the Treasury, who should from time to time establish such regulations for the export and transportation of live stock as the result of the investigation might require. Section 5 authorized the Secretary of the Treasury, for the purpose of preventing exportation from the United States to foreign countries of live stock affected with contagious diseases, to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary.

o Section- 6 and 7 are as follows:

"SEC. 6. That no railroad company within the United States, or the owners or masters of any steam, or sailing, or other vessel, or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

p SEC. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents or any railroad, steamboat, or other transportation company,

doing business in or through any infected locality, and by publication in such newspaper as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of, or person having control over, such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

By subsequent legislation the Department of Agriculture was created, to be under the supervision and control of a Secretary of Agriculture, and the authority vested in the Commissioner of Agriculture, and the duties which the law devolved upon him were transferred to the Secretary of Agriculture. Whatever orders, therefore, the Commissioner could have lawfully issued could be issued by the Secretary as his successor. Now, the only authority of either to make rules and regulations of any kind in respect to cattle is found in the third section of the act, and that empowered him only to prepare rules and regulations for the suppression and extirpation of the diseases, and it seems evident to us from the language of the section that it was the intention of Congress that in any measures taken by him looking to the suppression and extirpation of the diseases he must act in conjunction with State or territorial authorities. Until there

7 should be an agreement between him and them upon a method to be pursued, no part of the money appropriated by the act was available to him; so that, if he should prepare rules and regulations, they would be ineffective, unless a State or Territory interested should determine to co-operate with him in their enforcement. Until their acceptance by the domestic authorities, they would have no force in this State, and such acceptance was not shown; but, aside from all this, there was no evidence that any such rules or regulations as contemplated by section 3 were ever made. The order of February 5 was expressly based on section 7. It named section 7 as the sole authority for its issuance. That section made it the Secretary's duty to notify railroad, steamboat, and transportation officials doing business in or through an infected locality of the existence of the contagion, but it gave him no further power. The order contained the required notification, and to that extent was in exact conformity with the provisions of the section; but it went further and qualified the notification by a series of rules, upon compliance with which cattle might be removed from the territory in which the contagion existed to other parts of the United States. These rules find no support in section 7. That section simply directed the notice to be given and made the knowing violation of the provisions of section 6 by certain enumerated classes of persons a misdemeanor. When the notice was given the Secretary's statutory duty was fully performed, and whatever else he assumed to do in that connection he had no warrant for except the dictates of his

own private judgment. Section 6 prohibits the delivery for transportation or the transportation at all by any person of any live stock with knowledge that they are infected with a communicable disease, with the qualification that Texas fever shall not be considered a communicable disease as to cattle transported by rail to market for slaughter. It is the violation of this provision which section 7 declares to be a misdemeanor. The restrictions upon the transportation of cattle are prescribed by the statute. It contains all the regulations which Congress in its wisdom regarded as necessary in connection with the movement of cattle from one State or Territory to another. Certainly it was not in the power of the Secretary to prohibit, even qualifiedly, anything which it permitted or to permit, even upon condition, anything which it forbade.

Counsel agree that the order of April 23 was issued as a modification of that of February 5; and, upon its face, it would seem that it was so intended. Upon that hypothesis, its only authority was section 7, and what we have said in relation to the first order applies to it; but, whether it was a modification or an independent order, its first provision was in contravention of the statute. It assumed to permit the transportation of cattle from a district in which splenic fever had been declared to exist to the State of Colorado for grazing. If the cattle came within the prohibition of section 6, they could be transported only for slaughter, and their transportation for any other purpose would be illegal. If they were not within its prohibition, then the parties moving them did only what they had the right under the law to do, independent of any rules or regulations, and no cause of action could arise out of their removal. The second provision undertakes to regulate the duties in relation to them of the persons by whom they might be removed, after their arrival in the State, and it is upon this provision that the plaintiff's reliance is chiefly placed. After becoming domiciled within the State their management would be regulated by its laws and not by the act of Congress. Any violation of the Federal law in connection with the cattle would consist in their removal. The disposition of them afterwards was not within the scope of the statute. Section 3 was drawn with reference to the authority of the several States in matters pertaining to their domestic concerns. It distinctly recognized that authority, and so, we may say, did also the order of April 23 in providing for the concurrence of the State authorities in the enforcement of the regulations it contained.

The rules promulgated by the Secretary of Agriculture may have been conceived in wisdom. They probably were, and if they could be enforced we see no reason to doubt that the results would be beneficial; but with the question of their wisdom or unwisdom we have nothing to do. They were outside of any authority conferred by the statute, and could therefore have no greater effect than, perhaps, as an expression of the opinion of the Secretary. A disregard of their requirements would not in itself involve the violation of any law.

It may be that the act of transporting the cattle was contrary to the terms of the statute, and that, if so, the plaintiffs were entitled to redress for the injuries sustained; but in a case based on a violation of the statute a number of questions would arise which this record does not present. The case at bar is not a case of that kind, and as to it such questions would be purely hypothetical.

The plaintiffs complain that the court erred in the admission and exclusion of evidence and in its instructions given to the jury. We think there were some erroneous rulings in the course of the trial, but it would have been of no benefit to the plaintiffs if everything in the way of evidence which they offered had been received and everything that they objected to had been excluded; so that the errors, if any, were harmless. We are not at liberty to review the instructions, because no proper objection was made to them when they were given; but it is not very material to the plaintiffs whether they were good, bad, or indifferent. In no view of the case as made were the plaintiffs entitled to a recovery.

The judgment must be affirmed.

Affirmed.

Filed in court of appeals June 14th, A. D. 1897.

JAMES PERCHARD, *Clerk*.

And afterwards and on the 26th day of June, A. D. 1897, came the said plaintiffs in error and filed herein their petition for a rehearing of this cause; which said petition and the endorsement thereon is in words and figures as follows, to wit:

Endorsed as follows: 1200. In the court of appeals of the State of Colorado. *J. K. Mullen et al. v. Western Union Beef Company*. Petition for rehearing. *W. C. Kingsley, Victor A. Elliott*, attorneys for plaintiffs in error. Filed in court of appeals Jun- 26, 1897. James Perchard, clerk.

In the Court of Appeals of the State of Colorado.

J. K. MULLEN and CHARLES D. MCPHEE, Co-
partners, etc., Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF COMPANY, De-
fendants in Error.

No. 1200. Error to
the District Court of
Arapahoe County.

Petition for a Rehearing.

Come now the plaintiffs in error, by William C. Kingsley and Victor A. Elliott, their attorneys, and respectfully petition this honorable court for a rehearing of this cause upon the following grounds:

The decision and opinion of this court heretofore and on June 14th, 1897, rendered herein, affirming the judgment of the district court of Arapahoe county, Colorado, are erroneous, contrary to certain acts of the Congress of the United States and the rules and reg-

ulations of the Department of Agriculture of the United States, duly issued and promulgated, and greatly prejudicial to the rights and interests of the rights of the plaintiffs in error, in the following particulars, to wit:

x I. This court erred in holding that the several acts of the Congress of the United States and the rules and regulations of the Department of Agriculture of the United States relating to the shipment of cattle from certain parts of the Southern States into the State of Colorado during the month of June, 1891, were not and are not applicable to the case of the plaintiffs in error, as shown by the record herein.

II. This court erred in holding and deciding that plaintiffs in error were not and are not in any event entitled to recover damages in this action against the defendant in error on account of its violation of said acts of Congress and said rules and regulations of said Department of Agriculture.

III. This court erred in holding and deciding that the rules and regulations for the suppression and extirpation of infectious diseases of cattle and in respect to the transportation of cattle from certain States to other States and Territories were ineffective in the State of Colorado in June, 1891, at the time when plaintiffs suffered damages, etc., because, as this court holds and decides, the State authorities of Colorado had not then and there determined to co-operate with the Secretary of Agriculture for the enforcement of said rules and regulations.

y IV. This court erred in holding and deciding that in any measures taken by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among domestic animals he must act in conjunction with the State of territorial authorities.

V. This court erred in holding and deciding that the rules and regulations prepared by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among cattle, and to that end regulating and controlling the transportation of cattle from certain Southern States into the State of Colorado, as shown by the record in this action, had no force in the State of Colorado in June, 1891, at the time when, etc., because the State authorities of Colorado had not then and there accepted said rules and regulations.

VI. This court erred in holding and deciding that there was no evidence showing that the Secretary of Agriculture had at the time of the grievance complained of made any rules and regulations for the suppression of extirpation of infectious diseases among domestic animals or governing and regulating the transportation of such animals from certain parts of the United States into other States and Territories, as contemplated by the act of Congress approved May 29th, 1884, for the purpose of preventing the spread of infectious diseases among such animals and thus aid in suppressing and extirpating the same.

VII. This court erred in construing the several rules and regulations issued by the Secretary of Agriculture under the several acts

of Congress referred to in its opinion herein, and particularly in holding that the rules and regulations promul- by the Secretary of Agriculture, as shown by the record herein, were outside of any authority conferred by any act of Congress, and could, therefore, have no greater effect than an expression of the opinion of the said Secretary.

VIII. This court erred in holding and deciding that the rules and regulations promulgated by the Secretary of Agriculture on April 23rd, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendants in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by State laws and not by the act of Congress, and that the disposition of said cattle afterwards were not within the scope of Federal authority.

IX. This court erred in holding that the record herein does not present a case in which plaintiffs in error are entitled to redress for the injuries sustained by them by reason of the transportation of cattle contrary to the act of Congress and the rules and regulations of the Department of Agriculture promulgated thereunder.

VICTOR A. ELLIOTT,
W. C. KINGSLEY,
Attorneys for Plaintiffs in Error.

And on, to wit, June 28th, A. D. 1897, the same being a juridical day of the April, A. D. 1897, term of our said court of appeals.

Present: Hon. C. I. Thomson, presiding judge.

" J. B. Bissell, } judges.

" Adair Wilson, }

James Perchard, clerk.

John A. Murray, bailiff.

The following further proceedings were had and entered of record in said cause, to wit:

J. K. MULLEN and CHARLES D. MCPHEE,	} No. 1200. Error to the District Court of Arapahoe County.
Copartners, etc., Plaintiffs in Error,	
vs.	
THE WESTERN UNION BEEF COMPANY, De-	
fendants in Error.	

This cause now coming on to be heard upon the petition of plaintiffs in error for a rehearing herein and upon consideration thereof, and the court being fully advised in the premises, it is ordered by the court that the said petition be, and the same is hereby, denied.

And afterwards and on, to wit, the 28th day of June, A. D. 1897, came plaintiffs in error and filed herein their petition for a writ of error from the Supreme Court of the United States to this court of appeals; which said petition and the allowance of said writ of error.

by the president of this court, as also the endorsement thereon, are as follows, to wit:

cc UNITED STATES OF AMERICA, }
State of Colorado. }

In the Court of Appeals.

J. K. MULLEN and CHARLES D. MCPHEE, Plaintiffs in Error, }
vs. }
THE WESTERN UNION BEEF COMPANY, Defendants in Error. }

Petition.

Now come your petitioners, J. K. Mullen and Charles D. McPhee, by their attorneys, and respectfully represent unto this court that they are the plaintiffs in error in the above-entitled cause, and that on, to wit, the 12th day of July, A. D. 1892, plaintiffs in error filed in the office of the district court of Arapahoe county, State of Colorado, their certain complaint; and thereafter and on, to wit, the 22nd day of April, 1893, filed an amendment to said complaint.

That in and by said complaint and the amendment thereto the plaintiffs in error sought to recover damages against the defendant in error for the loss of stock occasioned by the communication from the cattle of the defendants in error to the cattle of the plaintiffs in error of a disease known as splenetic or Texas fever; that in said complaint and the amendment thereto it was alleged and charged that the defendant in error negligently, wrongfully, and unlawfully shipped from Kimble county, Texas, into the State of Colorado a large number of Texas cattle infected with the Texas fever, and wrongfully turned them loose in the vicinity of the cattle of the plaintiffs in error in Logan county, Colorado, and permitted them to run at large and to come in contact and mingle with the cattle of the plaintiffs in error in violation of the quarantine rules and regulations and orders of the United States Department of Agriculture established under and by virtue of the acts of Congress; by reason whereon the cattle of the plaintiffs in error became infected with the Texas fever and a large number of them died, to the damage of the plaintiffs in error in the sum of about ten thousand dollars.

That to said complaint and the amendment thereto the defendant in error filed its answer, which was in effect a denial thereof.

That upon the issues so joined a trial was had to the court and jury and a verdict rendered in favor of the defendant in error; to which verdict the plaintiffs in error then and there excepted.

That the plaintiffs in error thereafter made a motion for a new trial in said case, which was denied and judgment rendered on the verdict in favor of the defendant in error; whereupon your petitioners sued out a writ of error from this court and the cause was removed here, wherein on, to wit, the 14th day of June, A. D. 1897, this court, after argument, rendered its decision

therein affirming the judgment of the district court, and in the opinion therein rendered this court, among other things, says: "The case was tried below and is argued here upon the theory that if the loss of the plaintiffs' cattle (meaning the plaintiffs in error) was in consequence of disease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe; so that no question of negligence generally in the shipment and management of the cattle is presented by the record."

That in said opinion the court quotes the quarantine rules and regulations of the United States Department of Agriculture of the 5th of February and 23rd of April, 1891, established under the act of Congress and which had been introduced in evidence by the plaintiffs in error, after which the court says: "The effect to be given to the foregoing orders is dependent upon the provisions of the act referred to in the order of February 5th (23 U. S. Statutes at Large, page 31)." After which the court states the requirements of sections 2, 3, 4, 6, and 7 of said act of Congress. The court thereupon held and decided that the rules and regulations so given in evidence by the plaintiffs in error were not authorized by the said act of Congress and had no force and effect within the State of Colorado at the time of the grievances complained of by the plaintiffs in error.

That after the rendition of said opinion and judgment by this court plaintiffs in error filed their petition for rehearing, which was denied. Your petitioner further states that this court is the highest court having final jurisdiction of this cause in this State, and its judgment herein is not reviewable by the supreme court of this State, and in view of the premise above stated is reviewable by the Supreme Court of the United States.

Therefore your petitioners say that in the record and proceedings aforesaid, and in giving judgment in manner and form as the same is given, and in the affirmance of the judgment of the district court by this court, there is manifest error in this:

I. This court erred in holding that the several acts of the Congress of the United States and the rules and regulations of the Department of Agriculture of the United States relating to the shipment of cattle from certain parts of the Southern States into the State of Colorado during the month of June, 1891, were not and are not applicable to the case of the plaintiffs in error as shown by the record herein.

II. This court erred in holding and deciding that the plaintiffs in error were not and are not in any event entitled to recover damages in this action against the defendant in error on account of its violation of said acts of Congress and said rules and regulations of said Department of Agriculture.

III. This court erred in holding and deciding that the rules and regulations for the suppression and extirpation of infectious diseases of cattle and in respect to the transportation of cattle from certain States to other States and Territories were ineffective in the State of Colorado in June, 1891, at the time when the plaintiffs suffered

damages, etc., because, as this court holds and decides, the State authorities of Colorado had not then and there determined to co-operate with the Secretary of Agriculture for the enforcement of said rules and regulations.

IV. This court erred in holding and deciding that in any measures taken by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among domestic animals he must act in conjunction with the State or territorial authorities.

V. This court erred in holding and deciding that the rules and regulations prepared by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among cattle, and to that end regulating and controlling the transportation of cattle from certain Southern States into the State of Colorado, as shown by the record in this action, had no force in the State of Colorado in June, 1891, at the time when, etc., because the State authorities of Colorado had not then and there accepted said rules and regulations.

hh VI. This court erred in holding and deciding that there was no evidence showing that the Secretary of Agriculture had at the time of the grievance complained of made any rules and regulations for the suppression or extirpation of infectious diseases among domestic animals or governing and regulating the transportation of such animals from certain parts of the United States into other States and Territories, as contemplated by the act of Congress approved May 29th, 1884, for the purpose of preventing the spread of infectious diseases among such animals, and thus aid in suppressing and extirpating the same.

VII. This court erred in construing the several rules and regulations issued by the Secretary of Agriculture under the several acts of Congress referred to in its opinion herein, and particularly in holding that the rules and regulations promulgated by the Secretary of Agriculture, as shown by the record herein, were outside of any authority conferred by any act of Congress, and could therefore have no greater effect than an expression of the opinion of said Secretary.

VIII. This court erred in holding and deciding that the rules and regulations promulgated by the Secretary of Agriculture on April 23rd, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the State laws
ii and not by the act of Congress, and that the disposition of said cattle afterwards were not within the scope of Federal authority.

IX. This court erred in holding that the record herein does not present a case in which plaintiffs in error are entitled to redress for the injuries sustained by them by reason of the transportation of cattle contrary to the act of Congress and the rules and regulations of the Department of Agriculture promulgated thereunder.

Wherefore your petitioners respectfully ask that they be granted

a writ of error from the Supreme Court of the United States, that the errors herein assigned may be reviewed and your petitioners restored to all things they have lost by reason of the errors aforesaid.

VICTOR A. ELLIOTT,
W. C. KINGSLEY,
Attorneys for Plaintiffs in Error.

kk Endorsed as follows: 1200. United States of America, State of Colorado. In the court of appeals. J. K. Mullen & Chas. D. McPhee, plaintiffs in error, *vs.* The Western Union Beef Co., defendant in error. Petition. Writ of error as prayed for allowed this 28th day of June, 1897, and bond filed in sum of \$300. Charles I. Thomson, president judge. Filed in court of appeals this 28th day of June, A. D. 1897. James Perchard, clerk. William C. Kingsley, Victor A. Elliott, att'ys for pl'ffs in error.

ll *Citation, U. S. Supreme Court.*

THE UNITED STATES OF AMERICA, }
State of Colorado. }

The United States of America to the Western Union Beef Company,
Greeting :

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C, on the twenty-ninth day of July next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Colorado, wherein J. K. Mullen and Charles D. McPhee are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

CHARLES I. THOMSON,
*President Judge of the Court of Appeals of the
State of Colorado.*

We hereby accept due & legal service of the above citation this 30th day of June, 1897.

C. S. THOMAS,
W. H. BRYANT, AND
H. H. LEE,

Att'ys for said Western Union Beef Company.

mm [Endorsed:] 1200. Supreme Court of the United States. J. K. Mullen & Chas. D. McPhee, plaintiffs in error, *vs.* The Western Union Beef Co., defendant in error. Citation. Filed in court of appeals this 30th day of June, A. D. 1897. James Perchard, clerk. William C. Kingsley, Victor A. Elliott, att'ys for pl'ff in error.

nn And afterwards and on June 30th, A. D. 1897, came again said plaintiffs in error and filed herein their citation and bond; which said citation and bond, with the approval thereof and endorsement thereon, is in words and figures as follows, to wit:

oo UNITED STATES OF AMERICA, }
State of Colorado, } ss :

In the Court of Appeals of the State of Colorado.

J. K. MULLEN and CHARLES D. MCPHEE, Plaintiffs in Error, }
vs. }
THE WESTERN UNION BEEF COMPANY, Defendant in Error. }

Bond.

Know all men by these presents that we, J. K. Mullen and Charles D. McPhee, both of the county of Arapahoe and State of Colorado, are held and firmly bound unto the above-named The Western Union Beef Company in the sum of three hundred dollars, to be paid to the said The Western Union Beef Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly, severally, and firmly by these presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

pp Whereas the above-named J. K. Mullen and Charles D. McPhee have prosecuted a writ of error from the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judges of the court of appeals of the State of Colorado:

Now, therefore, the condition of this obligation is such that if the above-named J. K. Mullen and Charles D. McPhee shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. K. MULLEN. [SEAL.]
C. D. MCPHEE. [SEAL.]

STATE OF COLORADO, }
County of Arapahoe, } ss :

J. K. Mullen and Charles D. McPhee, being first duly and severally sworn, each for himself and not one for the other, say that they are each worth the sum of three hundred dollars in property not by law exempt from levy and execution, in said county and State, over and above their just debts and liabilities.

J. K. MULLEN.
C. D. MCPHEE.

Subscribed and sworn to before me this 28th day of June, A. D. 1897.

My commission expires February 1st, 1901.

CLARENCE L. SMITH,
Notary Public.

97 Endorsed as follows: 1200. United States of America, State of Colorado. In the court of appeals. J. K. Mullen & Chas. D. McPhee, plaintiffs in error, *vs.* The Western Union Beef Co., defendant in error. Supersedeas bond. Approved June 30th, 1897. Charles I. Thomson, president judge. Filed in court of appeals this 30th day of June, 1897. James Perchard, clerk. William C. Kingsley, Victor A. Elliott, attorneys for pl'ffs in error.

rr UNITED STATES OF AMERICA, }
State of Colorado, } ss :

In the Court of Appeals of the State of Colorado.

J. K. MULLEN and CHARLES D. MCPHEE, Plaintiffs in Error, }
vs.
THE WESTERN UNION BEEF COMPANY, Defendant in Error. }

Order Extending Time.

In the above-entitled cause it is ordered that the time for making the return to the writ of error herein to the Supreme Court of the United States be enlarged and extended from the date fixed in the writ of error to the first day of September, A. D. 1897, in pursuance to rule IX of the United States Supreme Court.

CHARLES I. THOMSON,
President Judge.

ss Endorsed as follows: 1200. In the court of appeals of the State of Colorado. J. K. Mullen & Chas. D. McPhee, plaintiffs in error, *vs.* The Western Union Beef Co., defendant in error. Order extending time. Filed in court of appeals June 30th, A. D. 1897. James Perchard, clerk. Wm. C. Kingsley, Victor A. Elliott, att'ys for pl'ffs in error.

tt UNITED STATES OF AMERICA, }
State of Colorado. }

In the Supreme Court of the United States.

J. K. MULLEN and CHARLES D. MCPHEE, Plaintiffs in Error, }
vs.
THE WESTERN UNION BEEF COMPANY, Defendant in Error. }

Assignment of Errors.

Now come the above-named plaintiffs in error and say that in the record and proceedings of the above-entitled case and in the judgment therein rendered in manner and form as the same is given there is manifest error, in this, to wit:

I. The court of appeals below erred in holding that the several acts of Congress of the United States and the rules and regulations of the Department of Agriculture of the United States relating to the shipment of cattle from certain parts of the Southern States into

the State of Colorado during the month of June, 1891, were not and are not applicable to the case of plaintiffs in error as shown by the record herein.

II. The court of appeals below erred in holding and deciding that the plaintiffs in error were not and are not in any event entitled to recover damages in this action against the defendant in error on account of its violation of said acts of Congress and said
uu rules and regulations of said Department of Agriculture.

III. The court of appeals below erred in holding and deciding that the rules and regulations for the suppression and extirpation of infectious diseases of cattle and in respect to the transportation of cattle from certain States to other States and Territories were ineffective in the State of Colorado in June, 1891, at the time when plaintiffs suffered damages, etc., because, as the court of appeals below held and decided, the State authorities of Colorado had not then and there determined to co-operate with the Secretary of Agriculture for the enforcement of said rules and regulations.

IV. The court of appeals below erred in holding and deciding that in any measures taken by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among domestic animals he must act in conjunction with State or territorial authorities.

V. The court of appeals below erred in holding and deciding that the rules and regulations prepared by the Secretary of Agriculture for the suppression and extirpation of infectious diseases among cattle, and to that end regulating and controlling the transportation of cattle from certain Southern States into the State of Colorado, as shown by the record in this action, had no force in Colorado in June, 1891, at the time when, etc., because the State authorities of Colorado had not then and there accepted said rules and regulations.

VI. The court of appeals below erred in holding and deciding that there was no evidence showing that the Secretary of
vv Agriculture had at the time of the grievance complained of made any rules and regulations for the suppression or extirpation of infectious diseases among domestic animals or governing and regulating the transportation of such animals from certain parts of the United States into other States and Territories, as contemplated by the act of Congress approved May 29th, 1884, for the purpose of preventing the spread of infectious diseases among such animals and thus aid in suppressing and extirpating the same.

VII. The court of appeals below erred in construing the several rules and regulations issued by the Secretary of Agriculture under the several acts of Congress referred to in its opinion therein, and particularly in holding that the rules and regulations promulgated by the Secretary of Agriculture, as shown by the record therein, were outside of any authority conferred by any act of Congress, and could therefore have no greater effect than an expression of the opinion of said Secretary.

VIII. The court of appeals below erred in holding and deciding that the rules and regulations promulgated by the Secretary of

Agriculture on April 23rd, 1891, as shown by the record therein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record therein, for the reason, as said court of appeals below held, that after said cattle were domiciled in Colorado their management must be regulated by State laws and not by the act of Congress, and that the disposition of said cattle afterwards *were* not within the scope of Federal authority.

IX. The court of appeals below erred in holding that *ww* the record therein does not present a case in which plaintiffs in error are entitled to redress for the injuries sustained by them by reason of the transportation of cattle contrary to the act of Congress and the rules and regulations of the Department of Agriculture promulgated thereunder.

Wherefore your petitioners pray for a reversal of the judgment and for all other proper relief.

W. C. KINGSLEY,
VICTOR A. ELLIOTT,
Attorneys for Plaintiffs in Error.

xx [Endorsed:] 1200. State of Colorado, United States of America. In the Supreme Court of the United States. J. K. Mullen & Charles D. McPhee *vs.* The Western Union Beef Company. Assignment of errors. William C. Kingsley, Victor A. Elliott, attorneys for plffs in error. Filed in court of appeals this 30th day of June, A. D. 1897. James Perchard, clerk.

yy U. S. OF AMERICA, }
State of Colorado, } *ss* :

J. K. MULLEN & CHAS. D. MCPHEE, Plaintiffs in Error, }
vs.
THE WESTERN UNION BEEF CO., Defendant in Error. }

To the clerk of the court of appeals of the State of Colorado.

SIR: Please prepare for use in the Supreme Court of the United States, by way of return to the writ of error directed to and served on you in said case, a true copy of the record, to wit:

1. Writ of error to district court.
2. Bond given by plaintiffs in error.
3. Opinion of the court.
4. Judgment of the court.
5. Petition for rehearing.
6. Order denying same.
7. Petition for writ of error & endorsement thereon.
8. Writ of error from U. S. Supreme Court.
9. Citation and endorsement acknowledging service.
10. Bond given.
11. Order enlarging time, &c.
12. Assignment of errors.

22 13. All other proceedings in the case in your court.
Please refer to Rule 8 q., U. S. Sup. Court.

W. C. KINGSLEY,
Att'y for Plaintiffs in Error.

Dated July 13th, 1894.

1 In the Court of Appeals of the State of Colorado.

J. K. MULLEN and CHARLES D. MCPHEE, Copartners, etc., }
vs.
THE WESTERN UNION BEEF COMPANY, Defendant. }

Assignment of Errors.

Come now the said plaintiffs in error, by W. C. Kingsley, their attorney, and say that there is manifest error in the record in this cause in this:

I.

The court erred in refusing to permit the plaintiffs to show the cost of the land and the improvements constituting their cattle range (page 22 of Abstract, folio 125 of Record).

II.

The court erred in refusing to permit the plaintiffs to show where their cattle had been sold (page 23 of Abstract, folio 131 of Record).

III.

2 The court erred in stating to the jury that they need not listen to the testimony then being given as to the reason for the plaintiffs not shipping their cattle, and excluding from the consideration of the jury the testimony from folios 134 to about 142 (page 23 of Abstract, folio 134 of Record).

IV.

The court erred in refusing to permit the witness Jordan to answer the question propounded to him (page 60 of Abstract, folio 404 of Record).

V.

The court erred in sustaining defendant's objection to the admission in evidence of the report of the witness Jordan (page 61 of Abstract, folio 406 of Record).

VI.

The court erred in sustaining the objection to the question "Whether the defendant shipped any other cattle from there to Colorado during that season" (page 62 of Abstract, folio 414 of Record).

VII.

* * * * *

VIII.

The court erred in overruling the plaintiffs' objection to the paper marked Exhibit 3 (page 103 of Abstract, folio 779 of Record).

IX.

The court erred in overruling the plaintiffs' objection to the interview between the witness Brush and one Peckeral (page- 117 & 112 of Abstract, folios 817-819 of Record).

3

X.

The court erred in overruling the objection to the question as to the general opinion of cattlemen, etc. (page 114 of the Abstract, folio 835 of Record).

XI.

The court erred in overruling the objection of the plaintiffs to the question as to the general opinion of veterinarians (page 114 of Abstract, folio 838 of Record).

XII.

The court erred in denying the plaintiffs' motion to strike out the answer of the witness referred to on page 123 of Abstract, folio 904 of Record.

XIII.

The court erred in overruling the plaintiffs' objection to the question to the witness Lamb as to the general opinion of veterinary surgeons and others as to the Texas fever line (page 124 of Abstract, folio 913 of Record).

XIV.

The court erred in overruling the plaintiffs' objection to the question calling for the interview between Secretary Rusk and others (page 125 of Abstract, folio 947 of Record).

XV.

The court erred in refusing to give the instructions asked by the plaintiffs from one to four, inclusive, and each of them (page 132 of Abstract, folios 963-965 of Record).

XVI.

The court erred in the followings paragraph of its instructions to the jury: "The defendant is not liable for the introduction and spreading of this disease, if you shall find that it was introduced and spread by it, if it exercised that degree of care and caution in bringing its cattle into that district that an ordinary, careful, and prudent man would exercise" (page 144 of Abstract, folio 983 of Record).

4

And the said complaint is in words and figures as follows, to wit :

(*Complaint.*)

STATE OF COLORADO, }
County of Arapahoe, } ss :

In the District Court in and for said County.

J. K. MULLIN and CHARLES D. MCPHEE, Copartners, Doing
Business as the Weld County Land & Cattle Company,
Plaintiffs,

vs.

THE WESTERN UNION BEEF COMPANY, a Corporation, De-
fendant.

No. —.

The plaintiffs represent, show, and allege that they, the plaintiffs, are copartners in the cattle business and for the purpose of carrying on said business, and that both of them are residents and citizens of the city of Denver, county of Arapahoe and State of Colorado, and that the defendant, The Western Union Beef Company, is a corporation created and organized under the laws of the State of Colorado and carrying on business in said State.

And for cause of action the plaintiffs represent, show, and allege that they are now and have been for several years last past engaged in and carrying on the cattle business in the State of Colorado, and that the range for their said cattle is mainly, if not entirely, 7 in the county of Logan, in said State, and lies on, along, and near the Platte river, and that the town of Cook, in the county of Logan, is the home ranch and the headquarters of the plaintiffs for the purpose of so carrying on their said cattle business, and that for the purpose of successfully prosecuting said cattle business these plaintiffs have procured, and had procured prior to the grievances hereinafter set forth as done and committed by the defendant company, the title to and that they do now own about twelve thousand acres of land, for which they paid a large sum of money, said land extending along the Platte river, in said Logan county, for a distance of about sixteen miles, beginning at what is known as Hliff's pasture, on the west side of the plaintiffs' said lands, and estending along said Platte river and along the north side thereof in an easterly direction to a point about five miles east of the said town town of Crook, in said Logan county, Colorado, and that in addition to said twelve thousand acres of land so owned by the plaintiffs, as aforesaid, they did hold at the time of the commission of the grievances hereinafter complained of and still hold by lease a large amount of land contiguous to the aforesaid twelve thousand acres, and that there is situated upon said lands so owned by the plaintiffs a certain spring, known as Knowles spring, the same being about four miles back of said Platte river, and the same being a most valuable water right for the purpose of supplying cattle with water, and for the aforesaid lease for the purposes aforesaid the plaintiffs paid a large sum of money, and also that there

are upon said lands certain water rights and privileges appertaining and belonging to said lands.

8 And plaintiffs represent, show, and allege that said lands, so owned and leased by the plaintiffs in connection with the water rights and privileges along the said Platte river and from the springs and other sources aforesaid were and are especially valuable for the cattle business of the plaintiffs, and that said lands and water privileges were obtained and procured by the plaintiffs for the purpose of raising, ranging, feeding, and taking care of their said cattle and otherwise carrying on the said cattle business.

And that the range of the plaintiffs for their said cattle was upon their aforesaid lands and upon the public lands adjacent thereto; and the plaintiffs further represent and show that prior to the year 1891 they had upon said lands a large number of cattle, consisting of steers, cows, bulls, and calves, and that in and during the year of 1891 they had about three thousand head of cattle upon said range, consisting of steers, cows, bulls, not counting calves, but principally steers; that said cattle in the year 1891 consisted of about nine hundred cows and thirty bulls, and the balance were steers in good condition and order, and that all of said cattle had upon them the "Box J" brand, and that said cattle were principally American cattle as distinguished from what are known and called Texas cattle.

And the plaintiffs further represent, show, and allege that on or about the 15th day of June, 1891, the defendant negligently, wrongfully, and unlawfully shipped from, to wit, the county of Kimball, in the State of Texas, a large number of Texas cattle, principally steers, and that on or about the 19th day of June, 1891, these same Texas cattle arrived in said Logan county, in the State of

9 Colorado, and were then and there by the defendant negligently, wrongfully, and unlawfully unloaded and branded at a point or place about three miles west of the plaintiffs' aforesaid lands, and on the same side of the Platte river as the plaintiffs' said lands and cattle, and turned loose on said range.

And, further, the plaintiffs represent and allege that the defendant well knew that the cattle so transported from the aforesaid section of the State of Texas to the State of Colorado, as aforesaid, and especially at the season of the year at which said cattle of the defendant were so transported from Texas to Colorado, as aforesaid, were liable to be infected with a contagious disease known as the Texas fever, and that the said disease was more than likely to develop in said cattle on their arrival and being turned loose and pastured in Colorado; and, further, that said disease would be imparted to their cattle mixing with said Texas cattle or feeding upon the same pasture as the Texas cattle.

And the plaintiffs further represent, show, and allege that said defendant transported said cattle from the said section of the State of Texas to the State of Colorado at the season of the year aforesaid contrary to and in violation of the quarantine regulations for the State of Colorado as lawfully established for the year 1891, and contrary to and in violation of the regulations of the United States

Department of Agriculture, lawfully established under and by virtue of the acts of Congress for that purpose passed.

And the plaintiffs further represent, show, and allege that the defendant, well knowing the fact aforesaid, did wantonly, carelessly, and negligently permit its said cattle to run at large upon

10 the range aforesaid so used by the plaintiffs, as aforesaid, so that without any fault or neglect on the part of the plaintiffs and without their knowledge the said infected cattle of the defendant became and were mixed and intermingled with the cattle of the plaintiffs, all of said cattle of the plaintiffs then being sound and healthy, along the Platte river on the aforesaid lands of the plaintiffs and the lands adjacent thereto, and so continued to mingle and mix with the said cattle of the plaintiffs and use the same range, through the carelessness and negligence of the defendant, and that shortly thereafter the said contagious and infectious disease known as the Texas fever broke out among the cattle of the defendant so infected and brought to the neighborhood of the plaintiffs' cattle and so mingling with the plaintiffs' cattle as aforesaid, and that said infectious and contagious disease known as the Texas fever was imparted and communicated to the plaintiffs' cattle, and that the plaintiffs' cattle so infected with the said disease so communicated to them by defendant's cattle commenced to die on account of said disease some time in the month of July, 1891, but that these facts did not come to the knowledge of the plaintiffs until some time afterwards, and that the plaintiffs' said cattle continued so to die until the disease ceased, in the fall of that year, although the plaintiffs, as soon as they learned the cause of the death of their said cattle, proceeded to move their cattle off of their own land and range and leave the defendant's cattle in the possession of the same.

That the plaintiffs lost on account of said disease so communicated to their said cattle one hundred and fifty head of said cattle, of the average value of \$25.00 per head and of the aggregate — of three thousand seven hundred and fifty dollars (\$3,750.00).

11 And so the plaintiffs allege that they were damaged upon this account in the sum of three thousand seven hundred and fifty dollars (\$3,750.00).

And the plaintiffs further represent, show, and allege that on account of the negligence and wrongs of the defendant, as aforesaid, they, the plaintiffs, incurred an expense in a large amount—that is to say, in the sum of three hundred dollars—in and about the moving of their said cattle, or such of them as were alive, from off of their range for the purpose of saving and protecting them from the ravages of the aforesaid infectious and contagious disease, and so were damaged on that account in the sum of three hundred dollars (\$300.00).

And the plaintiffs further represent, show, and allege that on account of the grievances committed by the defendant, as aforesaid, they, the plaintiffs, were obliged and compelled to herd their aforesaid cattle in and during the fall of the year of 1891 upon and in their winter pasture grounds—that is, that portion of their said lands usually reserved for the winter pasture of their said cattle,

the said lands containing about three thousand acres—and which was done in order to remove their said cattle from the lands and grounds infected by the defendant's cattle and from contact with defendant's cattle, so that there was a great scarcity of feed during the winter time in said pasture lands on account of the pasture having been exhausted by such fall grazing, whereby they, the plaintiffs, lost for want of such food and grazing one hundred and fifty head of their said cattle, of the average value of ten dollars per head and of the aggregate value of one thousand five hundred dollars (\$1,500.00), and so the plaintiffs allege that they were

12 damaged on this account in the sum of one thousand five hundred dollars (\$1,500.00).

And the plaintiffs further represent and allege that on account of the grievances so committed by the defendant, as aforesaid, they were prevented and prohibited from shipping such of the remaining cattle as were fit for beef to Omaha or to Chicago, their usual market for cattle, they being at the time of such grievances ready to ship such beef cattle, and having already at that time made their first shipment of beef cattle, and would immediately have shipped their remaining cattle fit for beef; that for such first shipment they received thirty dollars and twenty-five cents per head, which sum said cattle were worth, and that when said Texas fever broke out they had on hand and just ready for shipment four hundred and eighty-one other beef cattle of just the same class and just as good quality and of the same value as those already shipped, and which had been sold for the sum of thirty dollars and twenty-five cents per head, but the plaintiffs being prevented and prohibited on account of said fever from shipping the other said four hundred and eighty-one head of cattle until after the fever had disappeared with the frost of the fall season, they then shipped as speedily as possible, but, the price having considerably depreciated, they could only get and did only get on an average twenty-two dollars per head for said cattle, instead of thirty dollars and twenty-five cents per head, and thereby the plaintiffs sustained a loss of eight dollars and twenty-five cents per head on said four hundred and eighty-one head of cattle, making a loss in the aggregate on this account of three thousand nine hundred and sixty-eight dollars and twenty-five cents (\$3,968.25).

13 And the plaintiffs further represent, show, and allege that on account of the death of certain cows caused by said Texas fever, said cows being then the mothers of small calves, the calves, about twenty five in number, died for the want of sustenance, and that said calves were of the value, each, of six dollars (\$6.00), and the twenty-five of the value of one hundred and fifty dollars (\$150.00). And so the plaintiffs say and allege that on this account they were damaged in the sum of one hundred and fifty dollars (\$150.00).

And so the plaintiffs allege that on account of the wrongs and grievances committed by the defendant, as hereinbefore set out, they were damaged in the sum of nine thousand six hundred and sixty-eight dollars and twenty-five cents (\$9,668.25).

Wherefore the plaintiffs ask judgment against the defendant for

the sum of nine thousand six hundred and sixty-eight dollars and twenty-five cents (\$9,668.25), with interest thereon from October the first, 1891, and for costs of suit.

MARKHAM & CARR,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Charles D. McPhee, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled cause; that he has read the foregoing complaint, and that the facts therein set forth are true, except where the allegations are upon information and belief, and as to those facts he believes them to be true.

(Signed)

CHARLES D. MCPHEE.

Subscribed and sworn to before me this 12th day of July, A. D. 1892.

[SEAL.]

A. W. HILLE,
Notary Public.

My commission expires Aug. 27th, 1892.

(Endorsed:) No. 17054. In district court. J. K. Mullin & Charles D. McPhee, copartners, etc., *versus* The Western Union Beef Co. Complaint. Filed in district court, Arapahoe Co., Colo., Jul- 12, 1892. Matt. Adams, clerk. Markham & Carr, att'ys for plaintiffs.

And thereupon summons issued out of said court directed to the said defendant.

And said summons, with the return of the sheriff thereon, is in words and figures as follows, to wit:

STATE OF COLORADO, }
Arapahoe County, } ss:

In the District Court.

J. K. MULLIN and CHARLES D. MCPHEE, Copart-
ners, Doing Business as the Weld County Land &
Cattle Company, Plaintiffs,

vs.

15 THE WESTERN UNION BEEF COMPANY, a Cor-
poration, Defendant.

} Summons.

The People of the State of Colorado to the defendant above named,
Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiffs in the district court of Arapahoe county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if you are served within this county; if served out of this county or by publication, within thirty days after service hereof, exclusive of the day of service, or judgment by default will be taken against you, according to the prayer of the complaint.

If a copy of the complaint be not served upon you herewith, or if service hereof be made out of the State of Colorado, ten days additional time to that above specified shall be allowed for your appearance and answer in said action.

This is an action brought to recover the sum of \$9,668.25, with interest and costs of suit, on account of damages sustained by the plaintiffs through negligent, wrongful, and unlawful conduct of the defendant in exporting and bringing from certain parts of the State of Texas to the State of Colorado, during the summer season of the year 1891, a large number of Texas cattle and turning the said cattle loose upon the same range with the plaintiffs' cattle, whereby a certain contagious and infectious disease known as the Texas fever was communicated to the plaintiffs' cattle, causing thereby the death of a large number of plaintiffs' said cattle and other damages incident to and growing out of said wrongful and unlawful acts of the defendants.

Witness Matt. Adams, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of Denver, this 12th day of July, A. D. 189-.

[SEAL.]

MATT. ADAMS, *Clerk*,
By G. E. ENSEY,
Deputy Clerk.

STATE OF COLORADO, }
Arapahoe County, } ss:

I do hereby certify that I have duly executed the within summons this 14th day of July, A. D. 1892, by delivering a true and correct copy thereof to George G. Symes, he being the vice-president of said defendant corporation, The Western Union Beef Company, the president of said company not being found in my said county. I further certify that I also delivered to said George G. Symes a true and correct copy of the complaint in the above-entitled cause, all of which was done at the county of Arapahoe and State of Colorado.

WM. K. BURCHINELL, *Sheriff*,
By WM. McKISSICK, *Dept.*

(Endorsed:) No. 17054. Summons. District court, Arapahoe county. J. K. Mullin *et al.*, plaintiffs, *versus* The Western Union Beef Co., defendant. Filed in district court, Arapahoe Co., Colo., Jul- 15, 1892. Matt. Adams, clerk. Markham and Carr, plaintiffs' attorneys.

And afterwards and on, to wit, the 13th day of February, A. D. 1893, the same being one of the regular juridical days of the January term, 1893, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit;

J. K. MULLIN ET AL.
vs.
 THE WESTERN UNION BEEF COMPANY. } 17054. Damages.

At this day come the plaintiffs, by Markham & Carr, their attorneys, the said defendant neither appearing in person or by attorney, and thereupon this cause comes on to be heard upon the demurrer to the complaint and on motion of said plaintiffs.

It is ordered by the court that said demurrer be overruled, and that said defendant have time and until ten days from this day to answer said plaintiffs' complaint.

And afterwards and on, to wit, the 23rd day of February, A. D. 1893, came the plaintiffs, by their attorney, and filed herein a certain stipulation.

And said stipulation is in words and figures as follows, to wit:

18 STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court.

J. K. MULLIN and CHARLES D. MCPHEE, ETC., Plaintiffs, }
vs. } No. 17054.
 THE WESTERN UNION BEEF COMPANY, Defendant.

It is hereby stipulated that the defendant herein may have until March 1st, 1893, to file its answer in this case.

V. D. MARKHAM,
Attorney for Plaintiff.

(Endorsed:) No. 17054. Dist. court, Arapahoe Co. J. K. Mullin & C. D. McPhee *vs.* Western Union Beef Co. Stipulation giving defe't until M'ch 1st, '93, to file ans. Filed in district court, Arapahoe Co., Colo., Feb. 23, 1893. Matt. Adams, clerk.

And afterwards and on, to wit, the 25th day of February, A. D. 1893, came the defendant company, by G. G. Symes, Esq., its attorney, and filed herein its answer to plaintiffs' complaint.

And said answer is in words and figures as follows, to wit:

19 STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court.

J. K. MULLIN and CHARLES D. MCPHEE, }
 Copartners, Doing Business as the Weld }
 County Land & Cattle Company, Plaintiffs, } No. 17054. Answer.
vs. }
 THE WESTERN UNION BEEF COMPANY, a Cor- }
 poration, Defendant.

The said defendant company, for answer to the complaint herein, alleges—

That as to whether or not the said plaintiffs are copartners in the cattle business for the purpose of carrying on such business the defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Admits that the Western Union Beef Company is a corporation created and organized under the laws of the State of Colorado and carrying on business in said State.

That whether or not the said plaintiffs are now or have been for several years last past or at any time engaged in carrying on the cattle business in the State of Colorado, or whether or not they have a cattle range which is mainly or any portion thereof in the county of Logan, in said State, or whether it lies along the Platte river, or whether plaintiffs have a home ranch or have their headquarters for the purpose of carrying on their said business successfully or otherwise near the town of Crook, or whether or not they had
20 procured about 12,000 acres or any land or paid a large amount of money therefor or — amount of money, or whether the said land extends along the Platte river, in Logan county, for a distance of 16 miles or along said river for any distance or begins at what is known as "Illif's pasture," on the west side of plaintiffs' lands, to a point about five miles east of the town of Crook, in Logan county, this defendant has not and cannot obtain knowledge or information sufficient upon which to base a belief.

That as to whether or not the plaintiffs did hold at the time of the alleged commission of the grievances complained of or still hold, by lease or otherwise, a large tract of land or any land contiguous to the aforesaid 12,000 acres, or whether there is situated upon said lands alleged to be owned by the plaintiffs a certain spring known as Knowles' spring or any spring about 5 miles back from the Platte river or elsewhere, or whether the said spring is a valuable water right for the purpose of supplying cattle with water or for any purpose, or whether or not the plaintiffs paid a large sum of money for said land or water rights or spring or any sum of money, or whether or not there are upon said lands certain other water rights and privileges appertaining thereto or any water rights whatever, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That whether or not said lands alleged to be so owned and leased by plaintiffs, with said alleged water rights and privileges along said Platte river, were or are especially valuable or of any value whatever for the cattle business of plaintiffs, or whether said lands and water privileges were obtained or procured by plaintiffs for
21 the purpose of raising, ranging, feeding, or taking care of their cattle or any cattle or otherwise, or whether the alleged range of plaintiffs was upon the said lands or upon the public lands adjacent thereto, this defendant has not and cannot obtain knowledge or information sufficient upon which to base a belief.

That as to whether the plaintiffs, prior to the year 1891 or at any time, had upon the said lands a large or any number of cattle, consisting of steers, cows, bulls, or calves or any character of cattle, or whether during the year 1891 they had about 3,000 head or any

number of cattle on said range, or whether any cattle they had upon the range consisted of cows, bulls, calves, or principally steers, or whether they had in the year 1891 about 900 or any number of cows, about 30 or any number of bulls, or whether the balance or any number of their cattle were steers or in good condition, or whether all of said cattle had upon them the "Box J" brand or any brand, or whether said cattle were principally American cattle, this defendant has not and cannot obtain knowledge or information sufficient upon which to base a belief.

Defendant company denies that on or about the 15th day of June, 1891, or at any time it negligently or wrongfully or unlawfully shipped from any county in the State of Texas which was not located north and west of what is known as and called "the quarantine line" a large number or any number or any number of Texas or other cattle; denies that on or about the 19th day of June, 1891, or at any time any cattle were negligently or wrongfully or unlawfully unloaded or branded at a point about 3 miles west of

22 plaintiffs' said lands, on the same side of the Platte river as plaintiffs' land, or turned loose on the range at any point or place whatever; denies that the defendant at any time or in any way shipped or transported any cattle from Texas to the State of Colorado or elsewhere in any negligent, wrongful, or unlawful manner; but defendant avers that all the cattle of every kind shipped or transported by the defendant during the season of 1891 were driven and shipped from that part or portion of the State of Texas lying north and west of what is known as and called the "quarantine line" established by the United States Government and the Agricultural Department thereof, and were transported, shipped, unloaded, branded, and turned loose upon the ranges of the defendant company, in the State of Colorado, in strict accordance with the in pursuance to the statutes of the United States and of the State of Colorado and the rules and regulations of the veterinary board of the State of Colorado governing the shipment and transportation of cattle from the State of Texas to the State of Colorado.

Defendant company denies that it well knew or that it had any knowledge whatever or any reason whatever to believe that any cattle transported by it from the State of Texas to the State of Colorado during the year 1891, at the season of the year when cattle were transported or at any season of the year, were liable to be infected with the contagious disease known as Texas fever or any other disease whatever, or knew or had any reason to believe that said disease was likely to develop in said cattle on their arrival and being turned loose in Colorado, or in any way or at any time and place whatever, or knew or had any knowledge or any reason whatever to believe or suspect that by reason of shipping any

23 cattle of defendant they would impart or communicate any disease to any other cattle feeding upon the same pasture or range.

Defendant company denies that it transported said cattle or any cattle from the State of Texas to the State of Colorado or elsewhere at any season of the year contrary to or in violation of the quaran-

tine regulations of the State of Colorado for the year 1891 or for any year, or contrary to or in violation of any regulations of the United States Department of Agriculture, or in violation of any act of Congress; but alleges that any cattle the defendant shipped and transported from the State of Texas to the State of Colorado during the year 1891 were transported in strict accordance with such regulations and in pursuance to all the particular requirements of such regulations.

Defendant company denies that it did wantonly or carelessly or negligently permit any of its cattle to run at large upon the range aforesaid; denies that defendant company or any of its officers or agents had any knowledge whatever or any facts came to its or their knowledge that gave them any reason to believe that any cattle shipped by defendant during said season were infected with Texas fever or any other disease, or would communicate such disease to any cattle that might become mixed or intermingled with them on the same range; denies that any of the said cattle shipped from the State of Texas to the State of Colorado were infected with or did have Texas fever, or communicated the same to the cattle of the plaintiffs; denies that any contagious or infectious disease known as Texas fever, or any disease, broke out among the said cattle of this defendant or communicated to or infected plaintiffs' cattle with Texas fever.

24 Denies that plaintiffs' cattle were infected with Texas fever or any other disease communicated by defendant's cattle, or died by reason thereof; denies that any of plaintiffs' cattle died by reason of Texas fever or any other disease whatever being communicated to said cattle by any cattle of the defendant; denies that plaintiffs lost on account of any disease communicated by defendant's cattle to plaintiffs' cattle 150 head, or any other number, of cattle, of the value of \$3,750 or of any sum whatever; denies that plaintiffs were damaged in said sum of \$3,750.00 or in any sum.

Denies that on account of any negligence or wrongs of any kind of the defendant the plaintiffs incurred an expense of \$300.00, or any sum whatever, by moving their cattle to save them from any infectious or contagious disease communicated or liable to be communicated by defendant's cattle, or that plaintiffs were damaged on that account, or on any account, in the sum of \$300.00 or in any sum; denies that on account of any acts or grievances whatever committed by defendant plaintiffs were compelled to herd their cattle during the fall of the year 1891 upon their winter pasture or elsewhere, or to keep them away from contact with defendant's cattle; denies that there was a great scarcity of feed during the winter of 1891 on account of fall grazing, or that the plaintiffs were damaged in the sum of \$1,500.00, or any other sum, by reason of turning or having to turn their cattle into alleged winter pastures.

Defendant denies that on account of any grievances or any acts whatever committed by defendant plaintiffs were prevented
25 or prohibited from shipping their remaining cattle, or any cattle fit for beef, to Omaha or Chicago, or obtaining for their

cattle the usual market price or value; denies that the plaintiffs were damaged in the sum of \$3,968.25, or in any sum whatever, by reason of not shipping their beef cattle at the time they desired, or at any time, on account of unloading or turning loose upon the range of any cattle belonging to the defendant company, or were damaged in said sum, or any sum whatever, by reason of any acts—negligent, careless, or otherwise—of the defendant.

Defendant denies that any cows belonging to the said plaintiffs died by reason of Texas fever, or any disease, being communicated to them by any of the cattle of the defendant, and denies that by reason of the death of any of the cows of plaintiffs, caused by the communication of any Texas fever or other disease by the cattle of defendant, plaintiffs lost 25 or any number of calves of the value of \$150.00 or of any sum, and denies that plaintiffs were damaged on account thereof in the sum of \$150.00 or any other sum.

Denies that on account of any wrongs or grievances or any kind whatever committed by the defendant plaintiffs were or have been damaged in the sum of \$9,668.25 or any sum whatever.

Wherefore the defendant company prays to be dismissed with its costs herein expended.

(Signed)

G. G. SYMES,
Att'y for Def't Co.

STATE OF COLORADO, }
County of Arapahoe, } ss :

26 J. L. Brush, being duly sworn, on oath deposes and says that he is the agent, manager, and superintendent of the defendant company; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

(Signed)

J. L. BRUSH.

Subscribed and sworn to before me this 24th day of February, A. D. 1893.

(Signed)

ALMON E. HART,
Notary Public.

[NOTARIAL SEAL.]

My commission expires Sept. 23rd, 1896.

No. 17054. District court, Arapahoe county. J. K. Mullin *et al.* vs. Western Union Beef Co. Answer. Filed — district court, Arapahoe Co., Colo., Feb. 25, 1893. Matt Adams, clerk.

And afterwards and on, to wit, the 7th day of March, A. D. 1893, came the plaintiffs and filed herein their replication to defendant's answer.

And said replication is in words and figures as follows, to wit :

STATE OF COLORADO, }
 County of Arapahoe, } ss :

In the District Court.

27 J. K. MULLEN and CHARLES D. MCPHEE, Copartners, Doing }
 Business as the Weld County Land & Cattle Company, }
 Plaintiffs,

versus

THE WESTERN UNION BEEF COMPANY, a Corporation, Defendant. }

The Replication of the Plaintiffs to the Answer of the Defendant.

And now come the plaintiffs and reply to the answer of the defendant, and for replication thereto, or to so much thereof as they are advised it is necessary or material to reply unto, say they deny each and every allegation in said answer contained.

(Signed)

V. D. MARKHAM AND
 HARRY CARR,

Att'ys for Plaintiffs.

STATE OF COLORADO, }
 County of Arapahoe, } ss :

J. K. Mullen, being first duly sworn according to law, on oath deposes and says he is one of the plaintiffs in this action; that he has read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge.

J. K. MULLEN.

Subscribed and sworn to before me this 6th day of March, 1892.
 [NOTARIAL SEAL.]

JAMES H. BUFORD,

Notary Public.

My commission expires December 20th, 1894.

(Endorsed:) No. 17054. District court of Arapahoe county.
 28 J. K. Mullen *et al.*, pl'ffs, *versus* The Western Union Beef Co.,
 defendant. Replication of plaintiffs to answer of defendant.
 Filed in district court, Arapahoe county, Colo., Mar. 7, 1893. Matt
 Adams, clerk. V. D. Markham, att'y for plaintiffs.

And afterwards and on, to wit, the 22nd day of April, A. D. 1893, the same being one of the regular juridical days of the April term, 1893, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY.

} 17054. Damages.

At this day come the plaintiffs herein, by their attorneys, and on their motion—

It is ordered by the court that said plaintiffs have leave to file an amendment to the complaint herein, and that time and until twenty days from this day be given to answer said amended complaint.

And afterwards and on, to wit, the 22nd day of April, A. D. 1893, came the plaintiffs, by their attorneys, and filed herein their amended complaint.

And said amended complaint is in words and figures as follows,
to wit:

20 STATE OF COLORADO, }
County of Arapahoe, } ss :

In the District Court in and for said County.

J. K. MULLEN and CHARLES D. MCPHEE, Co-partners, Doing Business as the Weld County Land & Cattle Company, Plaintiffs,
versus
 THE WESTERN UNION BEEF COMPANY, a Corporation, Defendant.

Amendment to the Complaint.

And now come the plaintiffs and, by leave of the court for this purpose first had and obtained, files this amendment, so that the original complaint, commencing on page 3 and ending on page 4, and which reads as follows:

"And the plaintiffs further represent, show, and allege that on or about the 15th day of June, 1891, the defendant negligently, wrongfully, and unlawfully shipped from, to wit, the county of Kimball, in the State of Texas, a large number of Texas cattle, principally steers, and that on or about the 19th day of June, 1891, the same Texas cattle arrived in said Logan county, in the State of Colorado, and were then and there by the defendant negligently, wrongfully, and unlawfully unloaded and branded at a point or place about three miles west of the plaintiffs' aforesaid lands, and on the same side of the Platte river as the plaintiffs' said lands and cattle, and turned loose on said range," be amended so as to read as follows:

And the plaintiffs further represent, show, and allege that on or about the 15th day of June, 1891, the defendant negligently, wrong-
fully, and unlawfully shipped from, to wit, the county of
30 Kimball, in the State of Texas, and other parts of said

State of Texas a large number of Texas cattle, principally steers, and that on or about the 19th day of June, 1891, the same Texas cattle arrived by railroad in the county of Logan, in the State of Colorado, and were then and there by the defendant negligently, wrongfully, and unlawfully unloaded and turned loose at a point or place about three miles west of plaintiffs' aforesaid lands and cattle, and of which said cattle of the plaintiffs there were a large number, to wit, about five hundred beef cattle, steers, ready to be shipped to the eastern market- at, to wit, Chicago and Omaha, and which said beef cattle were then about to go and would have gone to said eastern markets long before the 1st day of December, 1891, and the defendant wrongfully, negligently, and unlawfully allowed and permitted its said cattle coming from Texas, as aforesaid, at the season of the year aforesaid, to occupy said range aforesaid so occu-

pied by the plaintiffs' cattle, as aforesaid, so that if said cattle were by the defendant company allowed and permitted to come in contact with the cattle of the plaintiffs aforesaid, all of which was contrary to and in violation of the quarantine rules, regulations, and orders of the United States Department of Agriculture, lawfully issued and established under and by virtue of the acts of Congress, and also contrary to and in violation of the quarantine rules, regulations, and orders of the State of Colorado, lawfully issued and established for the year 1891.

(Signed)

V. D. MARKHAM AND
HARRY CARR,

Attorneys for Plaintiffs.

STATE OF COLORADO, }
County of Arapahoe, } ss :

31 J. K. Mullen, being duly sworn according to law, on his oath deposes and says he is one of the plaintiffs in this action; that he has read the foregoing amendment to the complaint in this action and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

(Signed)

J. K. MULLEN.

Subscribed and sworn to before me this 21st day of April, 1893.

[SEAL]

CALVIN E. REED,

Notary Public.

(Endorsed :) No. 17054. District court of Arapahoe county, J. K. Mullen *et al.*, plaintiffs, *versus* The Western Union Beef Co., defendant. Amendment to complaint. Filed in district court. Arapahoe county, Colo., April 22, 1893. Matt. Adams, clerk. V. D. Markham and Harry Carr, attorneys for plaintiffs.

And afterwards and on, to wit, the 13th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit :

J. K. MULLEN ET AL.

VS.

THE WESTERN UNION BEEF COMPANY.

} 17054. Damages.

32 At this day come the parties hereto, by their attorneys, respectively; and thereupon comes a jury, to wit :

William Long,

George Sefton,

H. R. Bennett,

William Wegener,

Frank Mollandin,

Jacob Long,

Loveless Blaney,

William Gordon,

Hudson R. Nelson,

William Gorton,

John C. Schessler,

Frank Goodey,

twelve good and lawful men, and they are duly selected and tried, empannelled and sworn, to well and truly try the issues herein joined and a true verdict give according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment; and the said jurors, being each duly cautioned by the court not to converse among themselves nor with others touching the matter at issue herein, nor to listen to such conversation of others, nor to read nor hear read any publication bearing upon the same, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 14th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY.

17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment; and the said jurors, being by the court instructed to observe the caution heretofore given,
33 are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 15th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY.

17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment; and the said jurors, being by the court instructed to observe the caution heretofore given, are permitted to separate, to meet the court at its next incoming Tuesday next.

And afterwards and on, to wit, the 18th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY.

17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present

34 and in the jury-box, the trial of the issues herein joined is resumed.

And thereupon comes again the evidence, the hearing of which is continued to the hour of adjournment ; and the said jurors, being by the court instructed to observe the caution heretofore given, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 19th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit :

J. K. MULLEN ET AL.

VS.

THE WESTERN UNION BEEF COMPANY.

} 17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment ; and the said jurors, being by the court instructed to observe the caution heretofore given, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 20th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit :

35

J. K. MULLEN ET AL.

VS.

THE WESTERN UNION BEEF COMPANY.

} 17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial of the issues herein joined is resumed ; and the said jurors, having heard the evidence produced as well on behalf of the said defendant as of the said plaintiffs, and the argument of counsel, and being duly instructed by the court, retire to their room in charge of a sworn bailiff to consider of their verdict herein.

And afterwards and on, to wit, the 21st day of September, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit :

J. K. MULLEN ET AL.

VS.

THE WESTERN UNION BEEF COMPANY.

} 17054. Damages.

At this day come again the said parties, by their attorneys, respectively, and thereupon come again the said jurors, and on their oaths say :

" We, the jury, find the issues herein joined for the defendant."

And thereupon the said plaintiffs give notice to the court that they will move to set aside the verdict of the jury herein and for a new trial in this behalf.

And afterwards and on, to wit, the 17th day of December, A. D. 1894, the same being one of the regular juridical days of the September term, 1894, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY. } 17054. Damages.

At this day, after advisement, the court doth deny plaintiffs' motion for a new trial herein and let judgment for defendant on the verdict be recorded in the Judgment Book.

And afterwards and on, to wit, the same day (December 17, 1894), the following further proceedings, *inter alia*, were had and entered of record in the Judgment Book of said court, to wit:

J. K. MULLEN and CHARLES D. MCPHEE, }

Doing Business as the Weld County Land & Cattle Company, }

vs.

THE WESTERN UNION BEEF COMPANY. } 17054. Damages.

The court having this day ordered that judgment be entered in accordance with the verdict of the jury: no-, therefore,—

It is considered by the court that said plaintiffs take nothing by their said suit, and that said defendant go hence hereof and recover of and from the said plaintiffs its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the same day, the following further proceedings, *inter alia*, were had and entered of record in said court, to wit:

37 J. K. MULLEN ET AL.

vs.

THE WESTERN UNION BEEF COMPANY. } 17054. Damages.

At this day come the plaintiffs, by their attorneys, and ask and have of the court time and until ninety (90) days from this day within which to prepare and tender to the judge of this court their bill of the exceptions by them reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

STATE OF COLORADO, }
County of Arapahoe, } ss:

I, Matt. Adams, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a

true, complete, and perfect transcript and copy of the complaint, summons, stipulation, answer, replication, amended complaint, & orders of court had and entered of record in a certain cause in said court lately depending, wherein J. K. Mullen *et al.* were plaintiffs and The Western Union Beef Company was defendant, as the same now remains on file and of record in this office.

And I further certify the accompanying bill of exceptions and deposition to be the original bill of exceptions and deposition filed in said cause.

Seal District Court, Arapahoe County, Colo.

Witness my hand and the seal of said court, at the court-house, in Denver, county and State aforesaid, this 25th day of July, A. D. 1895.

MATT. ADAMS, Clerk,

By J. W. McHENRY,

Deputy Clerk.

38 The deposition of R. NAT. COWSERT, of the county of Kimball and State of Texas, a witness of lawful age, produced, sworn, and examined upon his corporal oath, on the 9th day of June, A. D. 1894, at the office of the clerk of the district court of Kimball county, State of Texas, and the town of Junction city, in said county and State, by me, W. G. Boyle, a commissioner duly appointed by a *dedimus potestatem*, issued out of the clerk's office of the district court of Arapahoe county, in the State of Colorado, bearing the teste in the name of Matt. Adams, Esq., clerk of the said district court, and the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said witness in a certain suit and matter in controversy now pending and undetermined in the said district court, wherein J. K. Mullen *et al.* are plaintiffs and The Western Union Beef Company is defendant, in behalf of the said defendant, upon the interrogatories of the defendant which were attached to or included with the said commission (no cross-interrogatories being so attached or included) and upon none others; the said R. Nat. Cowsert, being first duly sworn by me as a witness in the said cause, previous to his examination, to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows:

Answer to interrogatory first. My name is Robert Nathum Cowsert; I am 29 years of age; I reside in Kimball county, Texas; my business is that of a farmer and stockman, having worked a great portion of my time with cattle and horses.

39 Answer to interrogatory second. I know the Western Union Beef Company. I have known it for seven years or more. I first began working for the Western Union Beef Company in September, 1887 or 1888, and worked about two years. I again began work for said company about May 11, 1891, and worked as a hand in driving and shipping a herd of cattle to Colorado.

Answer to interrogatory third. In the month of May, 1891, I re-

sided in Kimball county, Texas, and began work for the Western Union Beef Company. I remained in Kimball county until May 11th, 1891, when I accompanied a herd of cattle shipped and driven by said company to Colorado.

Answer to interrogatory fourth. I knew of a herd of cattle driven and shipped in the month of May, 1891, by the Western Union Beef Company, of Kimball county, Texas, to Iliff, Colorado, consigned to J. L. Brush.

Answer to interrogatory fifth. I began work for the Western Union Beef Co. the last time about May 11th, 1891, the day the herd of cattle mentioned left the pasture of said company en route for Colorado. Part of the cattle in said herd were raised in said pasture and I believe that all of the cattle in said herd had been in said pasture for more than six months prior to May 11, 1891. For more than a year prior to May 11th, 1891, I was in the employ of N. T. Wilson, a member of the firm of the Western Union Beef Company, of Kimball county, or manager of said company, as clerk in a store in Junction city, Kimball county, Texas, and if any cattle had been brought from another county and turned into the pasture of the Western Union Beef Company I would have known it.

40 The condition of all the cattle in this herd was as good as the cattle of this county. I could see no difference in them in any respect and the cattle raised in this county. When the cattle left the pasture they were in two herds; I do not know how many head. The first night a good many were lost by escaping from the herd. They were driven in two herds to San Angelo, Tom Green county, Texas, where some of the big steers were sold—all of the largest. The remainder were thrown into one herd and driven to Quannah, Hardeman county, Texas, where they were loaded on the cars and shipped to Iliff, Colorado. There were 2,700 or 2,800 head of cattle of this herd loaded on the cars at Quannah. During the drive from the pasture in this county to Quannah and afterwards on the cars I discovered nothing that would indicate that all the cattle in this herd were not in as good condition as to health as any cattle in this county.

Answer to interrogatory sixth. When these two herds of cattle left Kimball county Ace Kercheville was boss of one herd and Ed. Hagemann was boss of the other. The names of the other hands are C. L. Hall, Horton Cloud, John Keese, George Keese, George Clark, Oscar Latta, Frank Wilson, myself, and others. These cattle were carried to Iliff, Colorado.

Answer to interrogatory seventh. In answer to interrogatory sixth I have answered this interrogatory as to what was done with these cattle until they were herded on the cars at Quannah. From Quannah they were shipped to Iliff, Colorado, where they were branded and turned loose upon the range.

Answer to interrogatory eighth. After being branded these cattle were driven across the river opposite Iliff and turned loose. They were in reasonably good condition, considering the trip they

41 had just made. They showed no sign of disease or other bad condition, except from being jammed around on the cars and driven.

Answer to interrogatory ninth. I do not know what became of the cars in which these cattle were brought to Iliff. I do not remember seeing them after the day we unloaded the cattle at Iliff. They were not on the track at Iliff the next day.

Answer to interrogatory tenth. These cattle arrived at Iliff in the afternoon, and the following afternoon, after being branded, they were driven across the river and turned loose just at the river. The river was up at the time and was about 500 yards wide.

Answer to interrogatory eleventh. These cattle arrived at Iliff in five different trains. The cattle in the third, fourth, and fifth trains were each turned loose about twenty-four hours after their arrival, and I believe the cattle in the first and second trains were treated in the same manner.

ROBERT NATHUN COWSERT.

I, W. G. Boyle, clerk of the district court of Kimball county and State of Texas, a commissioner duly appointed to take the deposition of the said Robert Nathun Cowsert, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Robert Nathun Cowsert as a witness in the said suit between the said J. K. Mullen *et al.*, as plaintiffs, and The Western Union Beef Company, as defendant, he was duly sworn by me to testify the truth in relation to the matters in controversy between the said parties so far as he should be interrogated concerning the same; that the said deposition was taken by me and reduced to writing by me,

42 W. G. Boyle, at my office of clerk of the district court of Kimball county, Texas, in the town of Junction city, in said county and State, on the 9th day of June, A. D. 1894, and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, Robert Nathun Cowsert, before me, at the place and on the day and year last aforesaid.

[Seal District Court of Kimball Co., Texas.]

W. G. BOYLE,
Clerk District Court of Kimball County, Texas,
Commissioner.

Statement of Costs of Accompanying Depositions.

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Witness fee, 1 day, \$1.00; 2½ miles	1.72
Total.....	\$6.57

[Seal District Court of Kimball Co., Texas.]

W. G. BOYLE,
Clerk District Court, Kimball Co., Texas.

STATE OF COLORADO, }
 County of Arapahoe, } ss :

The People of the State of Colorado to clerk of district court, Junction city, Texas, Greeting :


Whereas it has been represented to us that Natt R. Cowser
 and Oscar Latt — material witnesses in a certain case now
 43 pending in the district court of Arapahoe county, State of
 Colorado, wherein J. K. Mullen *et al.* are plaintiffs and The
 Western Union Beef Co. is defendant, and that the said witnesses
 reside at Junction city aforesaid, without the said State of Colorado,
 and that their personal attendance cannot be procured at the trial
 of said cause :

Now, know ye that we, in confidence of your prudence and fidelity, have appointed and by these presents do appoint you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witnesses to come before you at such — and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories and cross-interrogatories enclosed with or attached to these presents, both on the part of the said plaintiff and the said defendant, and none others, and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said district court with the least possible delay.

Witness Matt. Adams, clerk of the district court, and the seal thereof, at Denver, in said county and State, this 24th day of May, A. D. 1894.

[Seal District Court, Arapahoe County.]

MATT. ADAMS, *Clerk*,
 By G. S. RICHARDS, *Deputy*.

 See instructions on the other side.

Instructions as to the Mode of Taking, Certifying, and Returning Depositions According to the Statute Laws of Colorado.

44 Caption of the deposition.

The deposition of — —, of the county of — and State (or Territory) of —, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the — day of —, A. D. 189—, at the office (or house) of — —, in the town (or city) of —, in the county of — and State (or Territory) aforesaid, by me, — —, a commissioner (or by us, if more than one commissioner, inserting all the names of the commissioners) duly appointed by a *dedimus potestatum*, issued out of the clerk's office of the district court of — county, in the State of Colorado, bearing the teste in the name of — —, Esq., clerk of the said district court, and the seal of said court affixed thereto, and to me (of us, if more than one)

directed as such commissioner (or commissioners) for the examination of the said — —, witness in a certain suit and matter in controversy now pending and undetermined in the said district court, wherein — — is plaintiff and — — is defendant (insert the names of the parties litigant), in behalf of the said — — (plaintiff or defendant, as the case may be), as well on the cross-interrogatories of the — — as upon the interrogatories of the — —, which were attached to or included with the said commission and upon none others. The said — —, being first duly sworn by me (or by — —, one of the said commissioners, if more than one) as a witness in the said cause, previous to the commencement of the examination, to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows:

45 Answer to interrogatory first (here insert the answer), and so on successively in the order in which the interrogatories may be propounded and answered. Then follow the answer to cross-interrogatories: "Answer to cross-interrogatory first (if any) by the witness on the part of the defendant" (or plaintiff, as the case may be).

After the deposition is taken the interrogatories and answers should be read over to the witness, and if he asserts to the truth of the answers as written down the witness will then sign his name to the bottom of his deposition and swear to the truth of it before the commissioner.

Certificate.

(The commissioner should then certify as to the time, place, and manner of taking the deposition as follows:) "I, — —, of the county of — — and State (or Territory) of — —, a commissioner duly appointed to take the deposition of the said — —, a witness (or witnesses), whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said — — as a witness in the said suit between the said — —, as plaintiff, and — —, as defendant, he was duly sworn by me (or by — —, one of the commissioners, if more than one) to testify the truth in relation to the matters in controversy between the said parties so far as he should be interrogated concerning the same; that the said deposition was taken by — — and reduced to writing by — — (naming the person).

46 (or town) of — —; in the county of — — and State (or Territory) of — —, on the — day of — —, A. D. 189—, and that after said deposition was — (or us), as aforesaid, the interrogatories and answers thereto as written down were read over to the said witness (or witnesses), and that thereupon the same was signed and sworn to by the said deponent, — —, (naming him or them), before me (or us) at the place and on the day and year last aforesaid.

(Signed)

— —,
Commissioner."

(The foregoing certificate of commissioner should be at the foot or bottom of the deposition, immediately following deposition of witness.)

The commissioner should then attach the said deposition to this commission or interrogatories, and also the exhibit (if any), properly marked or lettered as "Exhibit A," etc., and enclose the whole in a suitable wrapper or envelope and then seal up the same securely with three seals, writing his name transversely across the middle seal or fold. The commissioner will also endorse, transversely across one end of the package thus sealed up, the names of the parties to this suit and address by mail to the proper address of the clerk issuing the commission as follows, to wit:

(The commissioner must in all cases accompany the return of this dedimus, with a statement thereon, over his signature, of all costs and expenses to which he is entitled and whether the same have been paid or not.)

In District Court for County
of _____,
A B, Plaintiff,
vs.
C D, Defendant.
Deposition of witness taken
on the part of the plaintiff
(or defendant).

To MATT. ADAMS,

Clerk of the district court,

Arapahoe county,

Denver, Colorado.

47 Neither of the parties to the suit or their attorneys or agents, or any person at all interested in the event of the suit, are permitted to draw, write, or dictate any part of the deposition required to be taken as aforesaid.

It is important to the validity of the deposition that these requirements and instructions should be strictly attended to.

P. S.—One caption will answer for the depositions of several witnesses, where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form above given, to be applicable to the number of witnesses examined.

Should an adjournment be necessary before the depositions are all completed, the commissioner will note the same.

Care should be taken to attach such deposition, commission, interrogatories, answers, and exhibits firmly together by means of tape or ribbon and using wax wafers or eyelets, when necessary.

STATE OF COLORADO,
County of Arapahoe, } ss:

In the District Court.

J. K. MULLEN ET AL., Plaintiffs,
vs.

THE WESTERN UNION BEEF COMPANY, Defendant.

} Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the depositions of Natt R. Cowser and

48 Oscar Lett, witnesses to be examined on behalf of the defendant in the above-entitled cause, residing at Junction city,

Kimble county, Texas, may be taken before the clerk of the district court in and for the county of Kimble and State of Texas upon the interrogatories and cross-interrogatories attached to this stipulation, and that all objections as to notice, time, and place and the formalities of taking such objections are hereby waived by both parties, said testimony to be read at the trial, subject to objections to be raised at that time as to its relevancy, competency, and materiality.

MARKHAM & KINGSLEY,

Attorneys for Plaintiffs.

C. S. THOMAS,

W. H. BRYANT,

H. H. LEE,

Attorneys for Defendant.

STATE OF COLORADO,
County of Arapahoe, } ss:

In the District Court.

J. K. MULLEN ET AL., Plaintiffs,
vs.

THE WESTERN UNION BEEF COMPANY, Defendant.

} Interrogatories.

Interrogatories to be Propounded to the Witness Natt R. Cowser, Called on Behalf of the Defendant in the Above-entitled Cause.

Int. 1. State your name, age, residence, and business.

Int. 2. Do you know the defendant in the above-entitled cause, The Western Union Beef Company; and, if so, how long have you known it and what have been your relations with it?

49 Int. 3. State where you resided in the month of May, 1891, and in what business you were then engaged.

Int. 4. Do you remember anything concerning a certain herd of cattle shipped in the month of May, 1891, by the defendant, The Western Union Beef Company, from Kimble county, Texas, to Iliff, Colorado, consigned to J. L. Brush?

Int. 5. If you say you remember anything concerning said herd of cattle, state what you know about the same, where they had been kept for six months prior to their shipment, what their condition

was as to health or otherwise at the time of shipment, the number shipped, and when they were shipped.

Int. 6. If you know, state in whose charge said herd of cattle left Kimble county, Texas, who accompanied the same, and what was finally done with said herd of cattle.

Int. 7. If, in answer to any of the foregoing interrogatories, you say that you accompanied said herd of cattle, state as fully as possible what was done with said herd from the time it left Kimble county, Texas, as long as you were with it.

Int. 8. State how said herd of cattle was turned upon the range at Iliff, upon which side of the river they were placed, and in what condition they were at that time.

Int. 9. State, if you know, what was done with the cars in which said cattle were brought to Iliff, how long they remained there, and what disposition was made of them after the cattle had been taken out.

Int. 10. State how long said cattle were kept at Iliff after they had been taken from the cars, where they were then driven, and how soon after their arrival.

Int. 11. If there is anything else you know concerning said herd of cattle or concerning this controversy as to which you have not been specially interrogated, answer the same as fully and completely as though you had been specially interrogated thereunto.

THOMAS, HARTZELL, BRYANT & LEE,
Attorneys for Defendant.

STATE OF COLORADO, }
County of Arapahoe, } ss.

In the District Court.

J. K. MULLEN ET AL., Plaintiffs,
vs.

THE WESTERN UNION BEEF COMPANY, Defendants.

{ Interrogato-
ries.

*Interrogatories to be Propounded to the Witness Oscar Latt, Called on
Behalf of the Defendant in the Above-entitled Cause.*

Int. 1. State your name, age, residence, and business.

Int. 2. Do you know the defendant in the above-entitled cause, The Western Union Beef Company; and, if so, how long have you known it and what have been your relations with it?

Int. 3. State where you resided in the month of May, 1891, and in what business you were then engaged.

Int. 4. Do you remember anything concerning a certain herd of cattle shipped in the month of May, 1891, by the defendant, The Western Union Beef Company, from Kimble county, Texas, to Iliff, Colorado, consigned to J. L. Brush?

Int. 5. If you say you remember anything concerning said herd of cattle, state what you know about the same; where they had been kept for six months prior to their shipment; what

their condition was as to health or otherwise at the time of shipment; the number shipped, and when they were shipped.

Int. 6. If you know, state in whose charge said herd of cattle left Kimble county, Texas; who accompanied the same, and what was finally done with said herd of cattle.

Int. 7. If in answer to any of the foregoing interrogatories you say that you accompanied said herd of cattle, state as fully as possible what was done with said herd from the time it left Kimble county, Texas, as long as you were with it.

Int. 8. State how said herd of cattle was turned upon the range at Iliff, upon which side of the river they were placed, and in what condition they were at that time.

Int. 9. State, if you know, what was done with the cars in which said cattle were brought to Iliff, how long they remained there, and what disposition was made of them after the cattle had been taken out.

Int. 10. State how long said cattle were kept at Iliff after they had been taken from the cars, where they were then driven, and how soon after their arrival.

Int. 11. If there is anything else you know concerning said herd of cattle or concerning this controversy as to which you have not been specially interrogated, answer the same as fully and completely as though you had been specifically interrogated thereunto.

THOMAS, HARTZELL, BRYANT & LEE,

Attorneys for Defendant.

52 (Endorsed:) 17054. District court, Arapahoe county. J. K. Mullen *et al.* v. The Western Union Beef Co. Stipulation & interrogatories for deposition. Cowsert & Latt. May 24, 1894.

(Endorsed:) 17054. Mullen *vs.* Western Union Beef Co. Deposition. Opened, published, & filed this 13th day of September, 1894. Matt. Adams, clerk, by G. S. Richards, deputy. Bill of exceptions. 17054. J. K. Mullen *et al.* *vs.* The Western Union Beef Co. Filed in district court, Arapahoe county, Colo., Apr. 18, 1895, as of Dec. 17, 1894. Matt. Adams.

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the District Court within and for said County.

53 D. K. MULLEN ET AL., Plaintiffs, }
vs. }
THE WESTERN UNION BEEF COMPANY, Defendant. }

Bill of Exceptions.

Appearances: For the plaintiffs, Markham & Kingsley; for the defendant, W. H. Bryant, Esq.

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the District Court within and for said County.

J. K. MULLEN and C. D. MCPHEE, Plaintiffs, }
vs. } No. 17054. Bill of
THE WESTERN UNION BEEF COMPANY, De- }
fendant. } Exceptions.

Be it remembered that on the 12th day of September, A. D. 1894, the same being one of the regular juridical days of the September term, A. D. 1894, of said court, the above-entitled cause came on in its order for trial before the Honorable David V. Burns, one of the judges of said court, and a jury of twelve.

Whereupon the following proceedings were had:

54 The plaintiffs, to sustain the issues in their behalf, introduced the following evidence:

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Plaintiffs offer in evidence certified copy of the rules and regulations, of date February 5th, 1891, of the U. S. Department of Agriculture.

55 Objection by defendant to the introduction of any evidence on the part of the plaintiffs herein, for the reason that the complaint in this cause does not state facts sufficient to constitute a cause of action, in that said complaint does not allege common-law negligence on the part of the defendant, and fails to allege any specific breach of any rules and regulations made by the national or State authority, and that the facts alleged are not sufficient to entitle plaintiffs to recover irrespective of the violation of any rules and regulations.

Objection overruled; to which ruling of the court defendant then and there excepted.

Thereupon defendant moves the court to compel the plaintiffs to elect on which ground of action they will proceed, whether on the ground of violation of the common-law rules of negligence or violation of any statutory provision.

Motion denied; to which ruling of the court defendant then and there excepted.

Objection by defendant to the introduction of the certified copy of rules and regulations offered by plaintiffs as incompetent, immaterial, and irrelevant, defendant admitting the copy to be a true and correct copy of such rules and regulations, and no objection is made to them as secondary evidence. Further objection that said rules and regulations are not shown to have been authorized by acts of Congress, and any act of Congress authorizing them is unconstitutional.

56 Objection overruled; to which ruling defendant then and there excepted.

Said rules and regulations are received in evidence and marked Exhibit "A," which are in the words and figures following, to wit:

Ex. A.

U. S. DEPARTMENT OF AGRICULTURE,
BUREAU OF ANIMAL INDUSTRY, WASHINGTON, D. C.

I, D. E. Salmon, chief of the Bureau of Animal Industry, Department of Agriculture, and custodian of all original orders and regulations of the Department of Agriculture concerning cattle transportation, certify that the copies hereto attached are full and correct copies of the regulations issued February 5, 1891, and the order of April 23, 1891, concerning cattle transportation, as appear from the originals in custody of this bureau.

D. E. SALMON,
Chief of Bureau of Animal Industry.

DISTRICT OF COLUMBIA, }
City of Washington, } ss:

Subscribed and sworn to before me this 7th day of February, 1894.

[NOTARIAL SEAL.]

F. L. EVANS,
Notary Public.

Regulations Concerning Cattle Transportation.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 5, 1891.

To the managers and agents of railroad and transportation companies of the United States, stockmen, and others :

57 In accordance with section 7 of the act of Congress approved May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," and of the act of Congress approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1891, you are hereby notified that a contagious and infectious disease known as splenic of southern fever exists among cattle in the following-described area of the United States :

All that country lying east and south of a line commencing at the southeast corner of the Territory of New Mexico, thence running northerly along the eastern boundary of New Mexico to the southwestern corner of the county of Cochran, State of Texas ; thence easterly along the southern boundaries of the counties of Cochran, Hockley, Lubbock, Crosby, Dickens, and King to the one hundredth meridian of longitude ; thence northerly along said one hundredth meridian to the southern boundary of the State of Kansas ; thence easterly along the southern boundary of the State of Kansas to the northeast corner of the Indian Territory ; thence southerly along the eastern boundary of the Indian Territory to the southwestern corner of the State of Missouri ; thence easterly along the southern boundaries of the State of Missouri and the State of Kentucky and the State of Virginia to a point where said boundary is intersected by the Blue Ridge mountains ; thence in a north-easterly direction, following said Blue Ridge mountains, to the

58 southwestern corner of the county of Madison, State of Virginia ; thence easterly along the southern boundaries of the counties of Madison, Culpeper, and Stafford ; thence northerly along the eastern boundary of Stafford county to the Potomac river ; thence following the Potomac river southerly to the Chesapeake bay ; thence easterly along the southern boundary of Maryland to the Atlantic ocean.

From the fifteenth day of February to the first day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations :

1st. When any cattle in course of transportation from said area are unloaded north or west of this line to be fed or watered, the places where said cattle are to be so fed or watered shall be set apart and no other cattle shall be admitted thereto.

2nd. On unloading said cattle at their points of destination pens shall be set apart to receive them and no other cattle shall be admitted to said pens; and the regulations relating to the movement of Texas cattle, prescribed by the cattle sanitary officers of the State where unloaded, shall be carefully observed. The cars that have carried said stock shall be carefully cleansed and disinfected before they are again used to transport, store, or shelter animals or merchandise.

3rd. Whenever any cattle that have come from said area shall be reshipped from any of the points at which they have been unloaded to other points of destination the car carrying said animals shall bear a placard stating that said car contains southern cattle, and each of the waybills of said shipment shall have a note upon its face with similar statement. At whatever point these cattle are unloaded they shall be placed in separate pens, to which no other cattle shall be admitted.

4th. The cars used to transport such animals and the pens in which they are fed and watered and the pens set apart for their reception at points of destination shall be disinfected in the following manner:

(a.) Remove all litter and manure. This litter and manure may be disinfected by mixing it with lime, diluted sulphuric acid, or, if not disinfected, it may be stored where no cattle can come in contact with it until after December 1st.

(b.) Wash the cars and the feeding and watering troughs with water until clean.

(c.) Saturate the walls and floors of the cars and the fencing, troughs, and shutes of the pens with a solution made by dissolving four ounces of chloride of lime to each gallon of water, or disinfect the cars with a jet of steam under a pressure of not less than fifty pounds to the square inch.

The losses resulting yearly to the owners of susceptible cattle, both in the interstate and export trade, by the contraction of this disease from exposure in unclean and infected cars and pens and by means of the manure carried in unclean cars from place to place and the threatened prohibition of our export trade by foreign governments because of the occurrence of this disease have become a matter of grave and serious concern to the cattle industry of the United States. It is absolutely essential, therefore, that this cattle industry should be protected as far as possible by separating the dangerous cattle and by the adoption of efficient methods of disinfection.

A rigid compliance with the above regulations will insure comparative safety to northern cattle and render it unnecessary to adopt a more stringent regulation, such as the absolute prohibition of the movement of southern cattle except for slaughter during the time of year that this disease is fatal.

Inspectors will be instructed to see that disinfection is properly done, and it is hoped that transportation companies will promptly put in operation the above methods.

Very respectfully,

J. M. RUSK, *Secretary.*

UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., April 23, 1891.

Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described may be moved from said area by rail into the States of Colorado, Wyoming, and Montana for grazing purposes, in accordance with the regulations made by said States for the admission of southern cattle thereto; provided—

1. That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the first day of December, 1891,

2. That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes of cattle shall not be allowed to come in contact.

3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5, 1891.

4. That the State authorities of the States of Colorado, Wyoming, and Montana agree to enforce these provisions.

The area from which cattle may go into the States of Colorado, Wyoming, and Montana by rail for grazing, as above provided, is as follows: All that area included within the following boundary lines, viz., commencing at the southeast corner of the Territory of New Mexico, thence running northerly along the eastern boundary of New Mexico to the southwestern corner of the county of Cochran, State of Texas; thence easterly along the southern boundaries of the counties of Cochran, Hockley, Lubbock, Crosby, Dickens, and King to the one hundredth meridian; thence northerly along said one hundredth meridian to the Red river, where it crosses the eastern boundary of the county of Childress; thence following said Red river to the northwest corner of the county of Wichita; thence along the eastern boundaries of the counties of Wilbarger, Baylor, Throckmorton, and Shackelford; thence west along the southern boundary of Shackelford county; thence south along the eastern boundaries of Taylor, Runnels, Concho, Menard, and Kimble counties; thence west along the south line of Kimble, Sutton, and Crockett counties; thence south along the east line of Pecos county to the Rio Grande river; thence along the Rio Grande river to the one hundred and third meridian, and thence northerly along said meridian to the point of beginning.

J. M. RUSK, *Secretary*.

62 J. K. MULLEN, one of the plaintiffs, being first duly sworn in his own behalf, testified as follows:

Direct examination.

(Mr. MARKHAM:)

Q. You are one of the plaintiffs in this suit, are you?

A. Yes, sir.

Q. What was your business in the year 1891?

A. I was engaged in the cattle business.

Q. Were you engaged in the cattle business?

A. Yes, sir.

Q. With whom?

A. With C. D. McPhee.

Q. How long had you been carrying on the cattle business at that time?

A. About four or five years; commenced in '84 or '85.

Q. Been carrying on the business during all that time with Mr. McPhee?

A. Yes, sir; but not as a—about '85 or '86 the business was carried on as a separate company, in which Mr. McPhee and myself were interested, but during 1891 and the year or two previous we were the sole owners.

Q. Were you engaged—or where were your headquarters of the cattle business?

A. Town of Crook.

Q. What county is that in?

A. It is what is now Logan county. I think at that time, about that time, they divided the county. I don't remember whether it was Weld or Logan at that time.

Q. Is Sterling in Logan county?

A. Yes, sir.

Q. How far is Sterling from Crook?

A. It is twenty or twenty-five miles, I guess.

Q. State, Mr. Mullen, whether you and Mr. McPhee at that time had a ranch in connection with your cattle business in Logan county.

A. Yes, sir; we did.

63 Q. Will you look at that map and state *whether* with reference to the Platte river that ranch is and how extensive it is? Point it out on the map.

A. Our line begins about here (indicating)—that is, this is the west line about there.

The COURT: Give the range.

A. It is in range 51, and it extends—takes in a good portion of the land, not all of it, however, a greater portion of it, and along near the river away clear down to below Crook, about seven miles below Crook, most of it extending along the river on the north side of the river and extending back a mile or two from the river.

Q. About how many acres does it embrace?

A. Between ten and eleven thousand acres of land that is owned by McPhee and myself—11,360 acres, I think.

Q. You and Mr. McPhee owned that?

A. Yes, sir.

Q. For what purpose did you obtain that land?

Objection by defendant as immaterial.

The COURT: For what purpose did they use it, I suppose, would be proper.

A. For cattle raising and feeding.

Q. Have you any improvements on that land?

Objection by defendant as incompetent, immaterial, and irrelevant.

Q. I simply want to show what they did to make this valuable.

Objection overruled; to which ruling of the court defendant duly excepted.

A. Yes, sir; we have.

Q. What kind of improvements?

Same objection by defendant as immaterial. Same ruling and exception as last above.

Q. We have houses located in convenient places on the
64 ranch to take care of the men that are engaged in taking care of stock, cutting hay in the fall, and feeding them, and so on, and we have a great portion of the place fenced. We have valuable improvements just north of Crook, and we have it under fence. I can point out that section. Up in the other end we also have improvements; that is in the west end.

Q. How much of it have you fenced?

A. Well, six or eight thousand acres of it fenced.

Q. How long did you say that strip of land owned by you and McPhee was—anywhere about?

A. From the extreme west to the extreme east it is about sixteen miles.

Q. How close is it to the Platte river, does it touch?

A. Yes, sir; lies along immediately to the bank of the river on the northeast and a little of it on the south; a bend in the river; one or two pieces on the south.

Q. Are those blue squares representing your land on the map?

A. I guess not all, but I guess most of them; the intention is to have a strip right along the river.

Q. What is the object in having it along the river?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled; to which ruling of the court the defendant duly excepted.

A. That the cattle may have access to the water in the river, and better hay lies along the river, so we can cut hay and take care of our cattle during the winter. It also extends up higher where there is a spring, certain places, ravines, and in certain sections there is valuable springs, and takes in nearly all these springs so we can water our cattle away from the river, so they don't have to go down to the river to get water, and in that way we own—we have most of the valuable springs—that is, all the springs of any valuable importance lying along the river in that immediate section.

65 Motion by defendant to strike out all the last answer of the witness as incompetent, immaterial, and irrelevant. Motion denied.

Q. About what was, if you know, the cost of the improvements on this property?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection sustained; to which ruling of the court plaintiffs duly excepted.

Q. I will ask the same question in reference to the land.

Same objection by defendant. Same ruling and exception.

Q. I understand you to say that these improvements were all put upon that land for the purpose of facilitating the cattle business?

A. They are all used for that purpose, yes, sir; we bought some of the improvements, and I don't know just for what purpose they were originally intended.

Q. You bought some with improvements already on it?

A. Yes, sir; used for that exclusively.

Q. Is the land used for any other purpose except in connection with your cattle business?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. No, sir; it is used for no other purpose.

Q. Are there other cattlemen or stockmen in that neighborhood?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. Yes, sir; all of the land—nearly all of the land not owned by us is owned by smaller cattlemen along both east and west.

Q. Do you know whether other men, cattlemen, had cattle on their places during the summer months of 1891?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

66 A. Yes, sir; I know they did have.

Q. Do you know how many cattle Mullen and McPhee had on their place or range around there in June and July, 1891, about?

A. Yes, sir; I know about how many; about four thousand head.

Q. Where did these four thousand head of cattle range, if you know?

A. They ranged up mostly up here (indicating on map), north and west, mostly north, but mostly ranged along on our own land; they came down to the river to water.

Q. What did you say, on your own land?

A. Right along here on our own land and north.

Q. That would be back from the river?

A. Yes, sir; up to the hills higher back.

Q. Is that land back higher they ranged on when they were not on your land, is that Government land?

A. I don't know; I think it always — understood that most of it was.

Q. Barre prairie land?

A. Yes, sir.

Q. To what extent did your cattle range and feed at that time upon your own land?

A. At that time to a greater extent than some other men during the year, because we were preparing to ship and our fat cattle was brought down preparatory to being shipped. In fact we had made one shipment, and the cattle were gathered up just before shipping time, the shipping being done in the summer months; somewhere from June, latter part of June, July, and August, and September the shipping is done; we have always shipped in these months.

Q. Would most of your cattle come down to the river during the twenty-four hours?

A. I should say they would; yes, sir.

Q. You say you shipped some cattle?

A. We had made one small shipment just to try the market.

Q. About what time had that shipment been made?

67 Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. I have to refresh my memory a little. The first shipment was made on the 25th of June to try the market a little; that is all. It was a very small shipment.

Q. Can you state, Mr. Mullen, what kind of cattle—you said — had somewhere about four thousand head at that time—what kind of cattle made up that four thousand head—about in proportion?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. I think there was about eight or nine hundred beef cattle and the balance run down from that, you understand, three and two and one; a good many cows; just an ordinary herd. We had previously shipped in steers, so that there was a larger portion of steers than she cattle.

Q. Any calves among them?

A. Yes, sir; a good many.

Q. That shipment was made about the 25th of June?

A. Yes, sir; 25th.

Q. Where did you ship to?

A. Was sold the 25th of June; the shipment was made a few days before.

Q. Where were they sold? Where was your market?

A. In Omaha.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection sustained; to which ruling the plaintiff then and there excepted.

Q. What was the value of these beef cattle shipped or sold on the 25th day of June?

Objection by defendant as incompetent, immaterial, and irrelevant.

The COURT: Just ask him a direct question: What were these cattle worth that remained there?

Q. What were these cattle worth that were beef cattle that remained on the place after this shipment?

68 Objection by defendant renewed. Objection overruled.

A. They were worth from thirty to thirty-five dollars per head—that is, on the basis of what had been shipped.

Motion by defendant to strike out the last answer.

Q. I ask this question as preliminary: I want to know if from his experience in the cattle business and knowledge of it if he knew the value of that kind of cattle at that time; did you?

A. Yes, sir; I did.

Q. What were these cattle worth—you have already stated, but it ought to follow this—these beef cattle worth that you had left at that time that you would have shipped them if you had not been prevented on the last days of June?

Objection by defendant as incompetent and immaterial and calling for a conclusion of the witness and the damages sought to be proved being too remote.

The COURT: I don't think that the objection that the damages are too remote is well taken. In what way were you prohibited and prevented from shipping these cattle?

Q. I have already asked you if you had shipped and you have answered that you made a shipment about—just before the 25th of June and were sold on the 25th of June.

A. Yes, sir.

Q. Then, I will ask you if you had other beef cattle ready to ship, and that you then and there immediately shipped afterwards.

A. I don't remember it quite afterwards; ask me again.

Q. When you found out that this fever was there, if you had other—I will ask you now why didn't you ship *ship* the other beef cattle that you had, if there is any reason?

69 Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

The COURT: I want to see what the evidence is, so I may know how to rule on the other questions.

A. We were all ready to ship another big lot of cattle when we received a telegram saying that they were affected with Texas fever.

Q. You received a telegram stating that?

Motion by defendant to strike out the last answer.

The COURT: Gentlemen of the jury, you need not listen to this. You need not pay any attention to this. This is for my ear for the present, and I will tell you when to regard it again.

To which ruling the plaintiffs then and there excepted.

WITNESS: You asked me why we did not ship the cattle?

Q. Yes, sir.

A. Because we received a telegram to that effect from our foreman, saying that he could not ship them, if I remember right.

Q. Why couldn't you ship them?

A. By reason of the Texas fever, they being affected with the fever.

Q. They had the fever?

A. Yes, sir.

Q. And for that reason you could not ship them?

A. Yes, sir.

Q. Were you prohibited in any other way except—by any other authority or force except the naked fact that they had the fever?

A. The veterinary surgeon decided that it was fever, and, of course, common prudence to protect ourselves and others. We knew we could not be permitted to ship them; at least we understood it that way. We would endanger everybody else's cattle that they came in contact with, and perhaps spread the fever if we moved them.

70 Q. Then if you had shipped them you would have shipped them with the knowledge that they had or were likely to have the Texas fever?

A. Yes, sir; that is the way I wrote to our foreman, telling him not to—

Q. And they were being shipped for beef? They were shipped for beef?

A. That is what we were to ship them for; principally to sell—

Q. And you came to the conclusion, I suppose, that you didn't want to ship a steer that had the Texas fever to Chicago for somebody to eat?

A. I think we came to the conclusion—I think that necessarily followed. I think anybody would understand that.

Q. Do you know whether there was any legal prohibition or quarantine prohibition?

A. We were not served with any papers, but we understood it that we—that under the law we would be liable if we moved the cattle that were affected.

Q. Don't you know that you were prohibited from shipping them through Nebraska?

A. I do, now that you remind me. I didn't in fact. It passed from my mind. I know that we or I was informed so, and in fact it was the law at that time that we could not move them through the State of Nebraska.

By the COURT:

Q. Where they had been exposed simply or where they were affected?

A. Where they were affected.

Q. All of your cattle were not affected, I believe?

A. Nearly all of them was, as near as we could understand; nearly all the cattle that was around in that vicinity.

The COURT:

Q. After they were affected did they recover, some of them? Did some of them recover their health?

71 A. After a long time, but only after they were put in a separate pasture and kept entirely separate, and fed and housed and taken care of, with special care being given to them, and kept separate entirely in a great, big field of thirty-three hundred acres—three thousand acres—that we had.

(Mr. MARKHAM continued:)

Q. Let me ask you if it was possible for you or anybody else to go into a herd of cattle of several thousand and tell which were affected and which not.

A. I cannot answer; I could not and don't pretend to know.

Q. Do you know any means by which any one could tell if any one was slightly affected?

A. I understand that they can; that cattlemen can do so; yes, sir—that is, when they were affected seriously; that is, to show they were sick.

Q. I asked in its incipient stages, when it commenced.

A. I cannot answer that; I am not an expert in that line.

Q. I understand that you would not be qualified and capable of going into a herd and tell by looking at it whether a steer had Texas fever or not.

A. No, sir; I don't know. We think our men—some would know.

Q. You have cattle which had it and which did not? You do now know that you were prohibited from taking cattle affected with the Texas fever through the State of Nebraska?

A. I was so informed at that time. I have always been in charge of the shipping, and directions in regard to cars and time of loading came through me, and hence it followed that I became acquainted with it. Just how the information reached me I don't know, but I remember that I was informed that was the law; that we could not move them through Nebraska.

Q. Don't you know that under all the rules and regulations that cattle affected with this disease, with the Texas fever, are prohibited from being shipped?

A. That is so.

72 The COURT: If the defendant was guilty of the negligence charged, it is liable for all the immediate direct damages flowing from it. If the cattle were once exposed to the fever, it is the duty of the plaintiffs not to ship them through the country until such time as they were satisfied it might be done with safety to public health. I do not think that the evidence which I have just listened to shows they were prohibited by any law or statute of any State pleaded, proved, or alleged from shipping cattle. Still it was their duty after they had been exposed not to ship them; to keep them there; that is a duty which they owed to the public, and that it demanded, that they do not expose other cattle and do not

expose the consumers of beef to injuries likely to flow from shipment of cattle that had been exposed; and if the retaining of them there for a necessary time for them to be inspected and until the proper season of the year for their shipment extained a loss upon the plaintiffs, they will be entitled, I think, to recover. At this time I think I shall have to allow all the facts to go to the jury; then I will try to regulate the matter of damage by proper instructions; that is the best that I can do under the circumstances of the case.

From this time on, gentlemen of the jury, you may regard the testimony that is to be introduced.

Objection by defendant to any and all testimony going to the jury regarding the difference in market price of the cattle as incompetent, immaterial, and irrelevant under the pleadings; that no sufficient foundation has been laid for such testimony; that the complaint does not state that the cattle in question were reasonably worth that

73 sum of any other sum, or that the plaintiffs lost that amount.
The COURT: I have noticed that the complaint is not definitely drawn in that particular; but I will permit the complaint to be amended in that particular, if you wish.

Objection by defendant to the amendment being made. (First.) Objection overruled.

Q. I will ask you again: You made this sale that you speak of on the 25th of June?

A. Yes, sir; 25th of June.

Q. What were these cattle sold for?

A. The steers sold for thirty-five dollars a head in Omaha.

Motion by defendant to strike out the answer.

The COURT: What were they worth at your ranch?

A. About thirty-two dollars.

Q. At your ranch?

A. Cost about three dollars a head to move them to Omaha; for that they sold on the open market.

Motion by defendant to strike out the answer as being at variance with the complaint, the complaint alleging the value at thirty dollars.

The COURT: They cannot recover more than they allege.

Q. Then you say you were prohibited from shipping these other beef cattle until frost came, or some colder weather?

A. Yes, sir.

Q. Were these beef cattle that you didn't ship on that account as good as those you had already sold of the same quality?

Objection by defendant renewed. Objection overruled.

A. Were they all of as good quality? I think they were as good. They were the same class of cattle.

The COURT: When you sold cattle under these circumstances did you sell them by weight?

A. Yes, sir; they were loaded in a car and go down there and put on the open market, and we had so much per hundred pounds.

74 The COURT: The question would be not only as to the quality, but also as to the weight.

(Mr. MARKHAM resumed.)

Q. Were they as good in weight? Would they average as good in weight as the first shipment you speak of?

A. Yes, sir; they would; generally averaged better—a little harder—those that were shipped later; of course, the first shipment of cattle is generally soft, as we call them.

Objection by defendant, as the testimony is too general.

Q. Did you ship these other cattle as soon, in your judgment, as was prudent to ship them, or as soon as you were allowed to ship them?

Objection by defendant.

A. Yes, sir; just as soon as we could.

Q. Where did you ship them to?

A. To Omaha; same market.

Q. How were the value of such cattle when you shipped the last, as compared with values when you shipped the first?

Objection by defendant to the form of the question.

Q. What was the reasonable market value of these same cattle that you shipped when you made the last shipment?

Objection by defendant renewed.

A. The cattle was lower.

Q. How much lower, if you know?

A. We thought about five dollars a head—five or six dollars a head; and by reason of the disease the cattle was lighter than they otherwise would have been. That is the way we footed it up. By reason of their sickness they didn't bring as much as they would had they not been sick.

Motion by defendant to strike out the answer as incompetent under the pleadings, no such allegation being made therein.

75 A. I said the cattle were five dollars apiece lower—that is, the same class of cattle.

Q. Do you know whether they were lower or not?

A. I say so. You asked me how much these cattle were worth less, which is a different question only.

Q. Get to the point; selling by the pound or by the hundred-weight; get at it in that way. Do you know what the cattle sold for—this shipment that was sold on the 24th of June—by the hundredweight?

A. They sold at \$3.75 per hundred.

Q. Do you know what the cattle sold for that you say were of as

good quality that were shipped afterwards, when you say the prices were gone down?

A. Pretty near about \$2.80 or \$2.70; about \$2.70.

Q. Do you know what was about the average weight of those that were beef cattle—beef steers?

A. Some cows are what we call beef cattle. Steers would average about 1,150—that is, that we sent first—or 1,100.

Q. Do you know how many of them were steers?

A. The first shipment was nearly all steers.

Q. How is it with the last shipment?

A. Not so great a proportion.

Q. Would it be half and half, or what proportion do you mean?

A. More than half steers.

Q. In the last shipment?

A. Yes, sir; in the last shipment.

Q. The last shipment, you say, was about \$2.70?

A. About \$2.70.

Motion by defendant to strike out the testimony as to the price obtained in Omaha as incompetent, immaterial, and irrelevant.

The COURT: The real question to be determined is the difference, if any, in their value. I think that is the same evidence. They were sold in the open market.

Objection overruled.

Q. How many of these beef cattle were, did I understand you to say, that you were compelled to keep over until after the cessation of this disease or until after frost came?

A. Between four and five hundred head. We didn't ship as many that fall as we would have shipped, even as it was. I would like to say to the court that in arriving at these values I would like to state what the rate of freight is to Omaha and the weight per car and show how that would average.

The COURT: They may ask you that on cross examination, if they wish. I won't spend time on it now.

Q. Something has been said, or a good deal has been said, about the Texas fever appearing down there and delaying this shipment. What do you know, if anything, about the appearance of the Texas fever there?

A. I don't know a blessed thing about it.

Q. You don't know what time—you didn't spend much of your time down there, did you?

A. No, sir; I don't know anything about it.

Q. Were you acquainted or reasonably acquainted with the values at that time of all kinds of cattle, calves, and cows and beeves?

A. I believe, fairly well. I am in the business.

Q. What was the value, if you know, of average calves at that time?

A. About seven dollars; six or seven dollars.

Q. You don't know anything about the loss of calves down there, do you?

A. Well, I know something about that; yes, sir.

Q. State what you know about that. I didn't know you knew anything about that.

The COURT: Of your own personal knowledge; not what anybody told you, of course.

77 A. I don't know.

Q. Do you know how many calves there were prior to the appearance of this disease in your herd?

A. Yes, sir; we kept an increase account and required the foreman to report from time to time the number of calves that is branded. He makes that report three or four times a year, when convenient, and I kept track of that in my book, so that I could know how many calves were branded each year.

Q. Have you any idea—and, if you have, state—how many calves you had down there at that time?

Objection by defendant.

The COURT: The witness states he does not know of his own personal knowledge.

Q. State, if you know, whether the cattle belonging to you and Mr. McPhee or any of them were moved from your ranch or range to some other place on account of this disease.

A. I don't know what you would consider information being sufficient. Our foreman asks for instructions and I give instructions, and they report that they do certain things, and I consider that they report correctly. If that is information or knowledge, then I know, but I don't go there and do it myself.

The COURT: I don't think that is competent. He may tell what he instructed them.

Q. State, then, whether or not you gave any instructions as to moving them.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. Yes, sir; I gave instructions as to moving them. The foreman asked for instructions and I gave them instructions.

78 Q. What were the instructions?

Objection by defendant renewed.

A. Can I look at my book? (Witness consults a book.) Our foreman asked for instructions and I wired——

Objection by defendant as hearsay, incompetent, and immaterial.

A. I wired in the morning of the day in regard to moving them: "Yes; ship or drive; will see Fred Wild. Answer by wire if you want cars or men to help." That was the instructions given to the foreman in the morning—in the forenoon.

Q. What is the date of that?

A. 31st of August. Later in the day I changed the instructions, and I will say that I at once made it my business to look up the cattlemen and get what information I could regarding the moving of the cattle, and I went down to see Brown Brothers, Mr. ——, and

I don't remember how many, a good many cattlemen in town, and they advised me not to move them, that I would be liable if I moved the cattle.

Objection by defendant.

The COURT: Just state what instructions you gave.

A. I wired again: "Brown Brothers and other cattlemen advise don't move. Don't move until you advise further with me;" which was practically a countermand.

Q. The same day?

A. The same day; then I wrote fully, giving the reasons of the danger.

The COURT: We don't care for that; simply if you gave instructions as to moving.

Q. Did you after that give him instructions to move?

A. Yes, sir; on our own place. This was in regard to shipping them away and I advised him not to do so. Then later I instructed him to move onto the back winter pasture, and in accordance with the instructions the foreman moved them onto the back winter pasture—that is, the pasture we reserved for our winter use.

Motion by defendant to strike out all testimony in regard to instructions given and communications between the witness and his foreman as hearsay and incompetent and immaterial.

The COURT: The motion is denied to the extent of instructions given; that is competent. But what was done thereafter is hearsay, as this witness does not know personally, and that must be proven by other evidence.

Q. Did you about that time see Mr. Brush?

A. Yes, sir, after; a short time after that. I wrote Mr. Brush and he came in.

Q. He came in where, to town?

A. Into our office.

Q. That was shortly after?

A. That was on the 10th day of September following.

Q. Do you know what connection Mr. Brush sustained as to the Western Union Beef Company?

A. Always known to us as manager; I guess that is what he is.

Q. Do you know whether he managed it or not?

DEFENDANT'S COUNSEL: We admit he was manager of the company.

Q. Did you make, at that time that you saw Brush, any complaint to him about these cattle?

A. Yes, sir; I did; I wrote him before he came, informing him of the condition of affairs.

Q. And it was in response to that that he came to your office?

A. Yes, sir. He said he would be in in a few days and he called.

Q. Did you request of him or say anything about moving the cattle away from there or his company?

A. Yes, sir; I requested him to do so in writing.

80 Mr. BRYANT: We would like the conversation.

The COURT: Yes; you cannot state what was in writing. Tell the conversation with Mr. Brush.

Q. He came in response to this writing?

A. Yes, sir; we went over the matter fully, and he said he would send his man down and move them; move the cattle away; promised to send him down right away, without any delay; and he explained how the cattle come to be over there to me fully, and we had a long talk about—

Mr. BRYANT: Can't you tell us what was said?

A. Mr. Brush said he unloaded the cattle at Iliff on the north side of his place, his range being south of the river; that they started them across the river to the south side, ours being on the north, and that they drifted back, he admitted, and got up to our springs, but he said he was away and did not know how bad it was.

Q. How bad what was?

A. How bad the situation was, and that he would attend to it at once, and send his man down there and move the cattle away. I explained to him that the cattle were drinking at our springs and mixing with our cattle, and there was a bad condition of affairs. He said he would see at once that they were moved away at once to the south.

Q. State to what extent, if you know, that they were mixing with your cattle.

Mr. BRYANT: If he knows. He does not appear to have been down there.

A. I was not there. I can only say what the foreman wrote me, and Mr. Brush did not deny it. He admitted that they were mixing.

Q. In the conversation between you and Mr. Brush was there any talk about where the cattle came from?

A. Yes, sir; some talk where they came from.

81 Q. Was there any controversy about where they came from?

A. No, sir; he corroborated a letter that he had previously wrote me and we talked the matter over.

Q. Where was that from; where was it dated?

A. He said he shipped twenty-eight hundred head from Texas, and that he thought they were all right.

Q. Did he say what county in Texas?

A. I cannot remember now whether he did or not.

Q. Do you know where these cattle were landed at Iliff?

A. Not from my personal knowledge; no, sir.

Q. Did Mr. Brush say where these cattle were unloaded in your talk?

A. Unloaded at Iliff.

Q. Do you know what they did with them when they unloaded them there? Do you know yourself?

A. I was not down there.

The COURT: You may state anything that Mr. Brush said to you.

A. Mr. Brush said that he unloaded them from the cars and drove them across the river, and there being no water in the river at that time—in June, I believe, there was hardly any water in the river there—and drove them across the river and then they drifted, or permitted them to drift back just across the river—just to drift across.

Q. You say Mr. Brush promised you or said that he would move them away at once?

A. Yes, sir; he did.

Q. Did he do so, of your own knowledge?

A. Our foreman said he did not.

The COURT: You can disregard that, gentlemen.

Q. Do you know whether the cattle remained there or not?

A. I don't.

Q. You have testified as to giving instructions to move your cattle up to another place, to some other part of the premises owned by you and Mr. McPhee. Do you know anything about the expense of the moving of them?

Objection by defendant as incompetent, immaterial, and irrelevant.

The COURT: If that is charged there and that is the proper thing to do, I think that would constitute a proper element of damage.

Objection overruled.

Q. Do you know anything about the expense?

A. I know what our foreman wrote me and what bills we paid; just what men was engaged.

Q. Not what your foreman told you, but what bills did you pay? Do you know the amount of them?

Objection by defendant.

The COURT: Your foreman is here?

A. Yes, sir.

The COURT: And he knows all these things?

A. Yes, sir.

Q. Are you acquainted with the country over which the cattle of the defendant, The Western Union Beef Company, ranges down there?

A. Well, I am acquainted with the country over which they ranged at that time.

Q. Do you know, of your own knowledge, what provisions they make for taking—have made or had made at that time for taking—care of their cattle at that particular place?

Objection by defendant as incompetent, immaterial, and irrelevant.

The COURT: Do you mean in reference to keeping them from mingling with the cattle of the plaintiffs?

Q. I mean what provisions they made at all for taking care of any cattle at all except to turn them loose among the cattle of McPhee and Mullen. I want to get in this evidence just to show what constitutes the negligence in this cause; that they had
83 taken no care or caution or prudence whatever.

The COURT: The real question is, what did they do? Did they turn them loose without herdsmen to care for them.

Q. I will ask what preparations had they made to receive these cattle that were brought up there from Texas; do you know?

Objection by defendant.

Q. Had they accommodations for them, so far as you know?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. I have been at Iliff and know what arrangements there are there for receiving cattle. I have been at the station and know what arrangements it has there for receiving cattle.

Q. What facilities have they?

Objection by defendant as incompetent and immaterial. Objection overruled.

Q. After they unloaded them, do you know where they took them to?

A. From what Mr. Brush told me; that is all. Personally I was not there and I have no personal knowledge. I don't know anything about it, but I talked the matter over with Mr. Brush.

Q. Had these cattle of his any water facilities except the Platte river?

A. No, sir; they had not.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. And our springs; they went up to our springs.

Q. Did they have any way to get water except from your springs or from the Platte river?

A. Nowhere else.

Objection renewed by defendant.

A. And mighty little water in the river then.

Q. In order to get water at either places—that is, from the springs or from the Platte river—would they or would they not have
84 to come in contact with and mingle with your cattle and other cattle?

Objection by defendant as incompetent, immaterial, and irrelevant.

A. Yes, sir; they would. That is the only way they could get water, and get water in no other way.

Q. They had nowhere else to get water, except it was absolutely

necessary that they should come in contact or mingle or mix with yours and other cattle to get water?

Objection by defendant as leading.

A. Yes, sir.

Q. Do you know whether the Western Union Beef Company had any cattle there, any cattle ranging there—I mean belonging to them—anywhere in that neighborhood?

A. I don't know; I guess they did. I don't know; they have kept it most everywhere.

Q. Do you know whether the Western Union Beef Company had any other cattle there at the time that they unloaded these Texas cattle there?

Objection by defendant as incompetent, immaterial, and irrelevant.

PLAINTIFFS' COUNSEL (Mr. Markham): I want to show that they did have cattle there, and, either anticipating that they were going to bring the fever there—Texas, or some of the kind—they moved their other cattle away from there and stocked the Texas cattle there; moved them some forty or fifty miles away. The jury can draw their own inference from that.

The COURT: On that statement the objection is overruled.

Objection by defendant to the offer as made, no such allegation being made in the complaint of such an act.

85 The COURT: That would come under the general head of negligence.

A. I don't know of my own personal knowledge.

Q. Did the Western Union Beef Company have different ranges or different places where they kept the cattle, or do you know anything about that?

Objection by defendant as immaterial.

A. I know it was considered that their range is south of the river; had a sort of understanding about that.

Motion by defendant to strike out the answer as incompetent. Objection and motion denied.

A. It — well understood that their range is south of the river by everybody and ours is north, and they don't get together.

Q. Do you know when, if at all, they did move these cattle from there?

A. No; I was not there.

Q. Who was your foreman or manager down there at that time?

A. Mr. Matthews.

Q. How long had he had charge of your cattle business there?

A. Been there three or four years at that time.

Q. Is he still the manager there?

A. Yes, sir; I guess so; still the foreman.

Q. I will ask you the general question, if there is anything you

know about this matter that I have not called your attention to of your own knowledge.

A. No; I don't remember now. I will say in answer to that—I don't know what is permissible—the conversations afterwards—something in regard to the compromising. That is not admissible.

Q. Conversations with whom?

A. With Governor Routt, the president of the company, and, I think, Mr. Brush, in regard to the compromise of damages.

86 The COURT: That is not admissible.

Cross-examination:

Q. When were you down there in 1891?

A. I could not tell you.

Q. Were you down there at all that summer?

A. Yes, sir; I was down there that fall; late some time in the year.

Q. After you had your talk with Mr. Brush?

A. Yes, sir.

Q. Was it in September or October?

A. I cannot tell you that.

Q. Would you put it either one of those two months?

A. No; I would not.

Q. Which one do you think it was?

A. It was during the fall.

Q. Some time either in September, October, or November; as late as November?

A. It might be as late as November.

Q. When were you there before that the last time?

A. I cannot tell you that.

Q. Were you there in June, at the time these cattle were shipped?

A. No, sir.

Q. Had you been there at all that year prior to that season?

A. I think I had, but I cannot swear to it.

Q. You have a spring round-up?

A. Yes, sir.

Q. Do you know when that was—about what month?

A. Very early summer.

Q. Were you down at the round-up or about that time?

A. I was there during one or two round-ups; I cannot remember whether it was that year or not.

Q. At any rate, you were not there when these cattle were shipped?

A. No, sir.

Q. On the 25th of June?

A. No, sir; I don't say that I was.

Q. Had you been there, say, for a month prior to that?

A. I don't think I had.

87 Q. So, then, we will commence on the 25th day of May; had you been there from the 25th of May until you went after these conversations with Mr. Brush some time in the fall?

A. My business takes me through there and once in a while I stop off; I cannot remember definitely; it is a long time ago.

Q. You say you had four or five hundred beef cattle; you don't know that of your own knowledge?

A. Yes, sir; I know that of my own knowledge; I consider that my own knowledge.

Q. Did you see and count them?

A. No, sir; but we afterwards shipped them and got our pay for them.

Q. You read the reports that they were shipped and got the money for them?

A. I know they were shipped; I ordered the cars and the number that were put in the car.

Q. You didn't ship them yourself?

A. I didn't go and catch them by the tail or anything like that; they were all shipped.

Q. All you know is you received a check for the payment of a certain amount of money?

A. I know more than that; I know that I ordered the cars and I know they were right at this town and I know that they were loaded at that station.

Q. How do you know that?

A. They were ordered there.

Q. How do you know they were loaded?

A. If they were not loaded there—

Q. You didn't see them loaded?

A. I consider that I don't have to see to know or to have knowledge.

Q. We want to know what your actual knowledge is from which you testify.

A. I think that knowledge is the same as if I shipped.

Q. You call knowledge what is derived from what people told you and what they wrote you and bills of lading and things of that kind?

A. I do. If a man sends an order for two hundred sacks of flour I know I load it and sent it to him, although I didn't
88 put it all in the car myself.

Q. At any rate, you were not there and saw any of these cattle shipped?

A. No, sir.

Q. And you never counted them personally?

A. No, sir.

Q. You never saw them weighed?

A. I don't know about that; I was in Omaha and I think likely I saw some of them weighed at Omaha.

Q. That would be the latter shipment?

A. Yes, sir. I don't remember whether it was that lot or not.

Q. How many did you ship on the 25th of June?

A. Shipped two cars.

Q. How many in a car?

A. Thirty-nine in two cars.

Q. Do you know what kind of cattle these were?

A. Yes, sir.

— What kind were they?

A. What do you mean by what kind?

Q. What kind of cattle were they—native cattle or Texas cattle.

A. Some of them were native; most of them were native.

Q. What do you call them; what class, kind or class; can't you classify them in any way? You say the others were of the same class. What class were they?

A. General class, general run of cattle.

Q. Is that as definite as you can get at it; were they Texas steers?

A. No, sir; I don't think they were. Texas steers; there might have been some of them.

Q. Just tell us what you call them, what you suppose they were and treated them.

A. We treated them as a general run of our cattle down there. I don't know whether they were Hereford or short horn or what they were. There was a lot of these breed down there.

Q. Do you know the difference between that kind of cattle and Texas cattle?

A. I know that there is a difference.

Q. Do you know whether these were or were not Texas cattle?

A. I cannot say now.

89 Q. Simply know they were the general run of cattle from your range?

A. Yes, sir.

Q. You say there were shipped a few days before the 25th of June. About how long?

A. Two, three, or four days, I suppose. They were sold the 25th of June.

Q. When did you first learn or hear that there was Texas fever there among your cattle?

A. In August.

Q. The day that you sent these instructions to your foreman?

A. Think a day or two before or a few days before.

Q. Say the 29th or 30th of August?

A. Perhaps not later than—of course, it was before that time.

Q. And you got a telegram, I understood you to say, from your foreman?

A. A telegram or letter.

Q. Between four and five hundred head of cattle ready to ship of, say, the 23rd or 24th of June. Was there anything that prevented you from shipping those cattle from that time until the 30th of August?

A. I cannot say as to that. I said they were ready to ship at the time of the fever. I didn't say they were ready to ship when that first shipment was made.

Q. I understood your testimony to mean that you were prevented from shipping these cattle and by reason of that prevention the

price fell. There was at least sixty days from the 24th of June until the 30th of August, in which you could ship at any time?

A. Yes, sir; and six months before that we could ship.

Q. But the cattle you loaded were already to ship on the 25th of June?

A. I didn't say so.

Q. Your complaint reads that.

A. Does it say so? I say we were prevented when the fever broke out.

Q. You allege here 481. Do you know how the price was from the 25th of June until the 31st of August—what the market price was?

A. I think the market kept up fairly well.

Q. Do you know; do you remember?

A. Yes, sir; I remember the market kept up pretty well.

Q. And you could ship those cattle at any time during these sixty days?

A. You must remember that the longer you keep cattle the heavier they get. You might say a man should ship his cattle all in June and July, and when we get them on cars in July, August, and September and ship them later in the year, when they weigh more—

Q. Don't you ship the big ones the first shipment you make?

A. Generally pick out about as good as the rest at the time.

Q. That was done in June?

A. But the same kept would weigh more; they would be still better if they were kept longer.

Q. Still better if kept later in the fall? Do you know anything personally about whether these cattle were picked out, this first shipment?

A. I don't know. I wasn't there.

Q. Did you instruct them to ship the heaviest and best of them?

A. No, sir; I didn't; that was left to the foreman.

Q. You say the steers averaged 1,150 pounds. What steers were these that you did ship or that you didn't ship?

A. Where did I say that?

Q. You testified to that.

A. What steers were you referring to?

Q. I want to get at that.

A. The first steers that were shipped—what did I testify to size? That is the first shipment I made.

Q. They were 1,150 pounds, the steers that were shipped in June. Do you know what the last ones were, the ones that were shipped in the fall?

A. They didn't weigh as much.

Q. Do you know what they weighed?

A. I don't remember; no, sir.

Q. How do you know they didn't weigh as much?

A. I probably could find out by looking over the books; but I don't know sure. I know they didn't weigh as much on this theory, that we were complaining of the poor health that the cattle

had and how poorly they done from the time of the fever until we were compelled to ship them.

Q. Who were complaining?

A. Mr. McPhee and myself and foreman.

Q. That is, your foreman would complain to you?

A. Yes, sir.

Q. You didn't go down there and look at them?

A. I think we did go down and look at them.

Q. You had ready for shipment on the 31st day of August four or five hundred head and were getting ready to ship them, and that the instructions which you gave your agent were in reference to shipping these cattle, were they; that first telegram that you read there?

A. No; that was in reference to moving them away.

Q. Going to move them in the cars?

A. Want to load them on the cars and move them away from the general rough herd because they were sick and affected and getting worse all the time.

Q. That had nothing to do with the shipping?

A. Not anything to do with shipping to market; it was past the time of the year when any cattleman would ship. Every year we ship during these months, and so do all cattlemen ship in the fall.

Q. When did you generally commence shipping—generally?

A. Generally commenced shipping about the last of August.

Q. How long do you ship?

A. Ship a train-load at any time until we get through; away along in November.

Q. The train loaded—how many cars?

A. Twenty cars about the size; according to the way we feel like sending.

92 Q. A train-load of twenty cars would have cleaned out four hundred head?

A. Yes, sir; it would.

Q. So you had only one train-load to ship?

A. I don't say that.

Q. You had four or five hundred head on hand to ship at that time?

A. We had, and shipped more than that, and later in the fall there would be others to ship.

Q. Had you any arrangements at that time to ship any cattle to market?

A. Didn't need to make any arrangements.

Q. Had you at that time any arrangements made?

A. The cattle are fattening, and that is making arrangements.

Q. Had you any definite plan or arrangements of shipping at that time, about?

A. Yes, sir; we had.

Q. How many did you have to ship?

A. We thought—we shipped all in the condition to ship.

Q. That would be four or five hundred?

A. The great bulk of them would have been shipped right away.

Q. And they would have all gone in this one shipment?

A. I would not say that. Sometimes a man think- it advisable to ship ten cars.

Q. Do you know what the market price of cattle was on the 30th of August?

Q. The market was just as good as it was in June.

Q. Can you tell us definitely what it was at that time?

A. We had taken pains to find out what it was, the same class of cattle, and they were worth just as much in August as they were in June.

Q. Did you sell any?

A. I think some were sold; some were shipped from different places not by us. I think Mr. Brush himself shipped some of our cattle once.

93 Q. When you got knowledge of the fever, when the fever had broken out in your range, you think the market price was as high as it was in June?

A. Yes, sir.

Q. For what length of time were you prevented from shipping?

A. I should think five or six weeks, anyhow.

Q. Until, say, the middle of October, that would be six weeks?

A. I think something about that.

Q. What was the market price at that time?

A. About \$2.70.

Q. Will you swear that the only reason that you didn't ship these cattle from the 31st day of August until the middle of October was on account of the Texas fever?

A. I will swear that if we didn't ship any at that time the only reason we didn't ship them was because of the fever.

Q. That is, you were ready to ship the last of August and intended to do the shipping?

A. We might have shipped them.

Q. Intended to do the shipping at that time?

A. Certainly.

Q. And were prevented from it solely by reason of this Texas fever?

A. I won't say solely; but I say we were prevented from it by the Texas fever; we do that every year when your cattle is ready to ship in the fall of the year; we ship—

Q. These cattle were ready to ship away back in June?

A. No, sir; that don't follow. Cattlemen don't ship in June, only a very few.

Q. Doesn't your complaint say and hav-n't you said they were the same grade and were the same character as these cattle shipped in June?

A. I say the same grade of cattle.

Q. The same quality?

A. The same quality.

Q. And the same weight?

A. I didn't say that.

Q. They ought to have been a little heavier by August?

94 A. It would be very foolish for any cattleman—that is, with a section for cattle to graze on—to ship out in June when they can sell in September, those not quite as fat, and make them heavier, and that is the usual way this is done.

Q. Why did you put this one shipment as the basis of all in this matter?

A. We put that for the purpose of determining the value of the cattle on the same market at the time we made the shipment, and perhaps, too, on account of the Texas fever.

Q. Don't the market value of cattle vary?

A. Sometimes it goes down and sometimes it goes up.

Q. Varies a little nearly every day?

A. I would not say yes or no to that. Sometimes it is the same for quite a little while. Different cattle bring different prices.

Q. You say you were acquainted with the value of cattle during that year. Your acquaintance consisted simply of your watching the market price of steers and in selling your own cattle?

A. We got reports from Omaha every day, and we were largely interested and sold a good many thousands of dollars' worth every day and watched the market all the time to see when they were worth the best, and that was the reason we paid special attention to it, as I would do this year if the same thing occurred.

Q. You say calves that year were worth six or seven dollars a head?

A. Yes, sir.

Q. What were cows worth?

A. It just depends on what kind of cows they were; whether they were young cows or old cows, big ones or little ones.

Q. Didn't you buy some cattle that year, in 1891?

A. I don't know; I could not tell; I guess I can tell if I had access to the books.

95 Q. Didn't you buy a herd in the mountains that year, in 1891?

A. We might; we buy a herd most every year.

Q. In Park county, from a man by the name of Bardhoff?

A. I don't know whether it was that year, but one year does not go by that we have not bought cattle; some cattle. I know we bought about that time.

Q. Do you remember what you paid for the herd that summer?

A. No, sir; I don't know that we bought any that summer.

Q. You don't remember?

A. I don't remember whether it was that summer; I know that we bought from Bardhoff; I also know now it was bought in the winter and delivery was made the 15th of May; whether it was '91 or '92 or '90 I cannot remember.

Q. What is your judgment about it?

A. I cannot give an opinion in regard to that.

Q. You wouldn't pretend to say?

A. I can tell by going to the book.

Q. Do you remember what you paid for them?

A. I think we paid fifteen dollars for them, \$14.50 or \$15.00.

Q. That is, counting the calves, or were they thrown in?

A. The calves are always thrown in. There is — ever-herd— out of a hundred cows there may be twenty calves, and they are thrown in.

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Q. You say these cattle that Mr. Brush turned out there can only get water in the river and at your springs?

A. Yes, sir; that is what I said.

Q. There is no water in the river?

A. I said very little water in the river.

Q. Were you there at all that summer?

A. Yes, sir; I was.

Q. Early in the fall?

A. Yes, sir.

Q. You don't know, as a matter of fact, whether he had to swim the lot all over across the river at that time? There were
96 three lots?

A. Do you say that they did?

Q. You don't know whether they had or not?

A. No, sir; I don't.

Q. Weren't there any springs on the south side of the river?

A. Very few, if any, springs. There is no water in the spring or summer.

Q. You have been all over that country?

A. Yes, sir.

Q. And know that on your own knowledge?

A. There is a few springs, and in the summer there is very little water.

Q. You have been over it in the summer, have you, yourself?

A. I have been over it; yes, sir.

Q. You were over it that summer—or, rather, were not?

A. I don't know about that. I was at our place. I looked up the date since, and I find I was at our place in October, as I told you.

Q. You have looked up the date since you were on the stand yesterday?

A. Yes, sir.

Q. You were at your place in October, and were not there until then?

A. Yes, sir; some time.

Q. Do you know about what time in October?

A. I think about the middle of the month.

Q. So that you didn't go down there to investigate this Texas fever in person?

A. No, sir.

Q. Left it all to Matthews?

A. No; there was some one else investigating it in addition to Mr. Matthews. The Government inspector was there.

DEFENDANT'S COUNSEL: I would like at this time, since Mr. Mullen has testified on cross-examination that he knows nothing

personally in regard to the number of cattle that were on the place and the number that were shipped, and was not there to count them, had nothing to do with it, that all his testimony in regard to these cattle be stricken out, on the ground that it is hearsay and incompetent.

97 A. I beg to say that I don't remember of testifying to that. On the contrary, I say I do know. I have the bills of lading of the shipment.

Redirect examination :

Q. I meant to ask you a question or two in reference to the shipment to make it more definite. I will ask before that: In any of your interviews with Mr. Brush, did he state what disease these cattle had died with?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. In the conversation with Mr. Brush, in my office, on the 10th day of September, we went over this matter fully, and Mr. Brush admitted that it was Texas fever. He said he was satisfied that it was Texas fever. He could not account for how—why it did not break out quicker, or something like that; could not account for why it had not made its appearance earlier.

Q. That was in the conversation in reference to your cattle, was it?

A. Yes, sir.

Q. That he was satisfied that it was Texas fever?

A. Yes, sir.

Q. In that conversation around about the 10th of September, in your office?

A. Yes, sir, *sir*; he was very fair about it, and had no difference about it at all. He said he would send his men down and have them at once remove the cattle. I might add further that in accordance with that understanding I at once directed our foreman that Mr. Brush would send his men down and move the cattle off from the range, and I wrote him to that effect that very day, a copy of the letter I have.

Q. In reference to that shipment of these cattle, state upon
98 what knowledge of yours you speak as to the number of cattle shipped before they were prohibited from being shipped by the fever. I asked you in reference to this. I didn't exactly understand it, that you said that you had somewhere about eight hundred head of cattle. You didn't mention it particularly—but one shipment before you stopped shipping on account of the fever. Was there more than one shipment?

A. Yes, sir; there was.

Q. You stated afterwards there was only between four and five hundred head; that you were stopped from shipping?

A. I said that at the time the fever broke out there was between four and five hundred on the ground to be shipped at the time the

fever broke out. There was remaining four or five hundred. I found that we shipped over eleven hundred head that year.

Q. Do you mean that you shipped over eleven hundred head besides the four or five hundred head?

A. No, sir; altogether; and that there was an additional shipment besides these fifty before the fever—before we were aware of the fever; and I would say further that accompanying the shipment, judge and jury, accompanying the shipment, is a statement of the number of cars, the number of head in each car, the statement of the commission house that sells them, together with the cost, showing the exact amount that they will bring.

Motion by defendant to strike out the last answer as hearsay evidence.

Q. I will ask you where you got that information from as to the number of cars, etc., of the cattle shipped; where did you get the information from.

A. From the railroad company and from our foreman and from the men that sells them and receives them.

99 Q. Did you get anything from the men to whom you shipped in the way of *weighbills* or anything of that kind?

A. I say so; yes.

Q. So from these sources of information you know these facts?

A. And a statement of the sales from the parties that sells them, together with the check.

Q. You got that in writing from the commission merchant or salesman to whom you sell them?

A. Yes, sir; get them in writing.

Q. Is that sent to you or is it sent to your headquarters on the ranch and then sent to you?

A. One copy is sent to me and together with the remittance, and the other copy of it is—duplicate is—sent to the foreman who makes the shipment.

Motion by defendant to strike out all the testimony of this witness in regard to the shipments as hearsay evidence.

Motion denied.

Motion by defendant to strike out all the testimony in regard to the loss of weight of the cattle, and the testimony received over the defendant's objection in regard to this element of damage, because it appears on cross-examination of the witness that the shipment referred to was made on the 25th of June, and defendant had no notice of the fever for sixty days thereafter, and no shipments were therefore stopped by reason of said fever, and the testimony is wholly at variance with the allegations of the complaint in relation thereto.

Motion denied.

(Redirect examination continued:)

100 Q. I will ask you if any of these cattle were shipped after the 25th of June, or were they shipped before you speak of having shipped a large number.

A. On the 28th day of July we sold 328 head, a copy of which statement I have accompanying the—

Mr. BRYANT: You get that from the source of information that you got the other?

A. Yes, sir.

Objection by defendant to the testimony as hearsay.

Q. That is what you speak of being sent by the commission merchant or salesman?

A. It comes from him and gives the price per hundred pounds, \$3.45.

Q. And the remittances for the payment?

A. Yes, sir; remittances for the payment. This lot sold for \$3.45 a hundred.

Objection by defendant to the testimony as hearsay, immaterial, and irrelevant and incompetent.

Q. Any other shipped before you found out the Texas fever?

A. One other small shipment made following this.

Q. When was the other small shipment?

A. About the first of August—first week in August.

Q. At that time you had heard nothing of the fever and knew nothing of the fever?

A. No, sir.

Q. And that left, you say, between four and five hundred?

A. Left between four and five hundred that would have been shipped had it not been for the fever.

Recross-examination:

Q. How many did you ship on July 25th?

A. 328 head.

Q. How many on August 1st?

A. About one hundred head, some time in August.

Q. Did they all bring \$3.45?

A. This lot, all except fifty cows, brought \$3.45, \$3.40, \$3.30, and fifty cows about \$2.25.

101 Q. What brought \$3.30?

A. A. Texas.

Q. You had some Texas cattle, did you?

A. Yes, sir.

Q. How many?

A. One hundred and sixty in this lot.

Q. 160 Texas; that was in 328, was it?

A. Yes, sir.

Q. They brought \$3.30?

A. They brought \$3.30.

Q. How many cows did you have in that lot?

A. Fifty.

Q. They brought \$2.25?

A. Yes, sir.

Q. All of the balance?

A. Yes, sir; all of the balance, including the cows, this lot, \$11,320.45.

Q. So when you testified that lot brought \$3.40 you mean about one-third of them brought \$3.45?

A. No, sir; I don't mean that.

Q. You don't mean any of them brought that?

A. I mean to testify just as it is; it is for \$3.45.

Q. And 118 steers out of 328 head—that is, 160 steers?

A. Yes.

Q. So that little less than half your steers brought \$3.45?

A. That is right.

Q. 118 of them?

A. Brought \$3.30; that is very close to it; that is a higher price than they brought in the shipment.

Q. What did that one hundred head on the first of August bring?

A. They brought about the same.

Q. Haven't you got the bill of lading or something of that?

A. I haven't got that.

Q. Where did you get that information?

A. I got that information from the book.

Q. What book?

A. The book here.

Q. Book kept by you?

A. Yes, sir.

Q. Were the entries given there in it?

A. The entries came from here.

Q. Through some bill of lading you got?

A. I could get that information for you.

102 Q. I want to know how that book is kept. Did you put the entries in it?

A. I did.

Q. And where did you get the information that you put in?

A. I got it from these statements.

Q. And you don't remember what that hundred sold for?

A. Brought a little less than that.

Q. What kind of cattle were they?

A. Something like these. Our Texas steers, I should explain—the Texas cattle is all steers, and are shipped in, and then after they are fed they are moved out, as Mr. Brush does his.

Q. You ship Texas cattle in yourself?

A. I never shipped any.

Q. Where did you get it?

A. I bought them close by.

Q. Put them on the range?

A. Yes, sir.

Q. And when were these Texas cattle put on the range?

A. I think about two or three years previous. 1891 finished up our Texas. We have had no Texas since.

Q. Sold out all your Texas?

A. Except a few strays—a few extras. I don't think we have bought any Texas since 1891 or since 1890.

Q. Do you know what his one hundred head that was shipped on the first of August consisted of—whether they were Texas or cows?

A. They might have been; I don't know.

Q. Do you know what the average weight of this shipment is of July 28th?

A. I could tell you.

Q. Would it take very long?

A. No; it would not take very long.

Q. I wish you would tell us as quick as you can come to it.

A. The natives—we had about 1,150. Seventy-two weighed seventy-nine thousand pounds.

Q. Seventy-two natives?

A. Yes, sir; that one lot of them, and another 46 weighed 50,080.

Q. Those the natives?

A. Yes, sir. 160 Texas weighed 165,590 lbs.

103 Q. How much did your cows weigh?

A. Fifty cows weighed 49,010 lbs.

Q. Do you know what the four or five hundred that were left and which you shipped later in the fall weighed when you shipped them?

A. Yes, sir; I know they didn't weigh as much.

Q. I will ask you if you know what they weighed.

A. I cannot tell exactly. I cannot remember to tell exactly.

Q. How many Texas were there in that lot?

A. Later?

Q. Yes, sir.

A. I don't think any.

Q. How many steers were there?

A. They were just mixed cattle.

Q. Have you any idea?

A. I think about the same proportion.

Q. This Mr. Matthews knows, or has he means of telling us definitely?

A. I didn't keep track of the she cattle or the steers or ages or weight on the books. I might be able to know by looking the files over.

Q. We would like to get some definite information. You have given us definite information about what you want to. We would like to get the other.

A. You drew me out. I didn't start out in detail this way. I only produced one bill yesterday.

Q. You don't think there was any Texans in this lot of four or five hundred?

A. I don't think so. There might have been a few. We occasionally ship Texans. I understand there is one left which is probably thirteen years old, and in the round-up you cannot gather everything close. Part of these cattle were shipped from one end of the range—that is, one was gathered from one end and part from

the other. I think this shipment was made from the extreme east and gathered on that end.

Q. What shipment?

A. The last shipment.

104 Q. You say Mr. Brush told you in that conversation that he believed it was Texas fever. Didn't he tell you that he had not been there and didn't know anything about it?

A. No; I don't think he did. He might. I don't think he did. He might have done it.

Q. Didn't he tell you he had been away and just got back; had not been down to the range at all?

A. No; he wrote me some time previous that he had been away in answer to my letter. I told him the condition of affairs. He wrote me and he told me that he had been away and just got back, and would investigate the matter and call at my office.

Q. Have you got that letter?

A. I have that letter; yes, sir.

Q. Did you give the date of it?

A. I could tell it.

Q. About how many days before he came in was it?

A. I think it was about a week.

Q. Didn't he tell you when he came in that he had not been able to go down yet to investigate?

A. I don't remember of his telling me that.

Q. And don't remember of his telling you that he would go down and investigate it?

A. I remember distinctly his telling me that he would come down and see that the cattle was removed from there, that he was satisfied that it was Texas fever, and that he would at once see that they were removed.

Q. Go down and look into the matter, and, if it was Texas fever, remove them?

A. He said he would see to it at once that they were removed from there.

Q. Didn't he also tell you that he could not understand how it was possible for his cattle to have it?

A. Yes, sir; I think he did; said he could not understand it how the cattle got it.

Q. Tell you they had exercised great care in bringing them up?

105 A. He said——

Q. Turned them loose with his cattle?

A. He didn't say that he exercised great care, but got a bill of health for them.

Q. From the quarantine authorities?

A. Yes, sir.

Q. And had been kept in the proper district?

A. I think he went over that.

Q. And that he had been shipping the same cattle for three or four years previous?

A. No, sir; he didn't say that.

Q. You could not tell us, I suppose, just what was said?

A. Anything he said relating particularly to the matter upon which he came there—that is, the object for which he came—it was in answer to my letter—telegram to him, and the damage that had been done and the number of cattle that died there and forty or fifty people there that had lost all their cattle, and the papers later that I sent to Mr. Brush—anything relating to that I would remember. If he said when he came there, why he came, or anything not important, I would not likely remember it, but anything relating to that business I would remember. I remember distinctly the promise that he would at once remove all his cattle off of our place there, and that very day I wrote our foreman, telling him what Mr. Brush had promised me.

Q. What I want to get at particularly is what he said in regard to the cattle, where he got these cattle, and what he had done with them before he put them there.

A. I remember Mr. Brush made the best of it. He acted gentlemanly in the matter and I never had any words and never had any difficulty. He was very sorry that it had happened and that he could not account for the fever being there, but he was satisfied it was the fever.

106 Q. He could not account for it?

A. No, sir. Whether that information was obtained by being there or what he learned, I don't know.

Q. Don't you remember his saying that he had not been there to see, but judging from reports he had he believed it was Texas fever?

A. That might have been. I would not say yes or no to that. Perhaps I haven't testified that he said he was there.

Q. I know. I want to get at your best recollection as to that—what he said.

A. I testified to the fact that he believed it was Texas fever and admitted that it was.

Q. Don't you think he said, judging from what reports he had heard, that he believed it was Texas fever?

A. I don't remember whether he did or not. I am willing to take it that way; if Mr. Brush says it was that way, I am willing to take it.

Q. Wasn't he in the same fix that you were, that he had not been there and did not know personally?

A. If Mr. Brush says that, I am willing to let it go at that.

SAMUEL R. MATTHEWS, a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct examination:

Q. Where do you live?

A. Town of Crook.

Q. What county is that in?

A. Logan.

Q. In what business were you engaged or what was your employment in the year 1891?

A. I had charge of McPhee and Mullen's ranch or cattle.

Q. Did you have charge of their cattle upon this ranch and range described by Mr. Mullen in this evidence?

A. Yes, sir; I did.

Q. How long have you been in their employment at this place?

107 A. I went there the 13th day of December, 1887.

Q. And you have continued to do so?

A. Yes, sir.

Q. In what capacity did you represent them?

A. I represent them as foreman, and buying and selling cattle and shipping, and had charge of everything there.

Q. How long have you been engaged in the cattle business?

A. About forty-two years; since I was ten years old.

Q. Whereabouts?

A. From Texas to Dakota.

Q. In what particular States?

A. I was in Texas in '73; then I came to Nebraska, and from Nebraska to this State—from '73 up to now.

Q. How long were you in Texas?

A. I had been there since '49 till '73.

Q. Has your business been most exclusively in cattle?

A. That is all I ever done.

Q. Were you familiar with their cattle on this ranch and range in the year 1891?

A. I was.

Q. Look at that map and state where their range or where their land is.

A. Our land is right in here; here is what we call the home ranch; that is what we call our home ranch right there (indicating), and we run on a piece and then run back. Here is another one of our ranches here. Here is another one, what we call the west-end ranch, and our land runs along there until you get about there.

Q. Point out the springs.

A. There is a spring right there, and a good spring right there, and another big spring right there, right on this little creek running down here.

Q. About what is the extent of this land of theirs along near or contiguous to the Platte river?

A. Do you mean how far up and down?

108 Q. Yes, sir.

A. About ten miles from one end to the other along the river, and there is some land back; there is a tract—mile and—half from the river. There is a spring in that, and this other spring in the home ranch is about two miles from the river—two and a half—and then the other one is about four in here—about four back of the river.

Q. Is there much water during the seasons of the year or *or* summer season for cattle there, except the river and these springs?

A. There is no water except the river and the springs, except after a big rain.

Q. Any other business carried on by Mr. McPhee and Mullen upon this land or in connection with the cattle business?

A. No, sir; only my garden and potato patch.

Q. What is the extent of these improvements upon these lands?

Objection by defendant as immaterial and irrelevant. Objection overruled.

A. At the home place we have a shed two hundred feet long and twenty-four feet wide and a corral two hundred feet square. I have got a good, big barn, and have another shed at the home place seventy feet long and another sixty feet long.

The COURT: I don't think you need go into details of that kind.

Q. There are houses, and the other place just the same—barn and houses and corrals.

Q. Are portions and parts of this land enclosed in fence?

A. Yes.

Q. About how many acres?

A. I have got thirty-five hundred acres in one pasture and about three thousand in another, and there is two sections in another, and then about two and a half in another.

109 Q. And all of that, we understand, was for the purpose of taking care of the cattle?

A. Yes, sir; cattle.

Q. About how many head of cattle did Mullens and McPhee have there, in that range, in the month of June, 1891?

— About four thousand.

Q. Can you tell about the kinds or proportion of steers, cows, etc.?

A. I cannot, because I never kept no count of branding; I never kept no count of the steers; I never know.

Q. Can you state which were the larger or smaller part of them—whether American cattle as distinguished from Texas?

A. Biggest part of American cattle.

Q. Did you buy the cattle or have anything to do with the buying of the cattle that are brought into that range?

A. I have bought every one they got on there.

Q. When was the last time, if any, Texas cattle had been brought there?

A. By us? That was in 1890.

Q. I will ask you to state if you have any knowledge of what is called or generally known as the Texas fever.

A. Well, I saw it in '71 in Kansas.

Q. I will ask you if you had any knowledge of what was called the Texas fever.

A. Yes, sir.

Q. Will you now state what your source of information is in reference to the Texas fever—what knowledge you have of it?

A. Well, what I saw at all, whenever a cow was sick any day there.

Q. What source of information have you; where did you get your knowledge from—from Texas or Missouri?

A. My first from Kansas. We didn't have the Texas fever in Texas.

Q. Then, the Texas fever will not break out, do I understand it, while the cattle run at home and remain there?

A. No, sir.

Q. When, if you know, or under what circumstances does
110 the *itself* develop itself?

Mr. BRYANT: I would like to know whether he is an expert on this; whether he is competent to testify.

The COURT: That is what he is trying to do—to get his source of information.

Q. Where did you first see the Texas fever?

A. In Kansas.

Q. Where, if you know, did it come from?

A. They came from Texas cattle that we were herding there. We were herding some of them Texas cattle up on Ashton's place.

Q. You were herding some Texas cattle that was in Kansas?

A. Yes.

Q. Where did you ever learn anything more about it?

A. The next I ever heard of it was down here. That was where—down here on the Platte river. That is the next I saw. I heard of it twice. That is the next I saw.

Q. Did you gather the cattle in Texas?

A. Yes, sir; I saw them there.

Q. Do you know and understand from being in the cattle business so long the history of the Texas fever?

A. No, sir; I don't.

Q. You say you examined these cattle in Kansas?

A. Yes, sir.

Q. These were the only cattle you come in contact with or examined that had the Texas fever until these?

A. Yes, sir.

Q. I will ask you under what circumstances or what removals, from where to where, does the Texas fever develop itself, if you know.

The COURT: Have you any knowledge on the subject? You may state it if you have.

A. No, sir; only just what I have seen.

Q. Just what you have seen?

A. Yes, sir.

111 Q. Don't you call that knowledge?

A. Yes, sir; I say knowledge; what I have seen.

Q. I will ask you now under what circumstances, from a removal from what place to what place north or south, does this develop itself.

Objection by defendant as not proper foundation laid to show the witness's competency. Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. Do cattle have Texas fever in Texas at all?

Objection by defendant.

A. Not where I lived.

Q. Do you mean to say that there was no Texas fever any part of Texas that you lived in?

A. I never heard of it in the southern part of the State.

Q. And in the southern part of the State you didn't know of its existence at all?

A. No, sir; never knew such a thing in the southern part of the State there amongst the Texas cattle. That is all we had.

Q. You say these cattle in Kansas had the Texas fever?

A. Yes, sir.

Q. Had any of these cattle you saw in Kansas died with that disease?

A. Yes, sir.

Objection by defendant, as the witness has not shown himself competent.

Cross-examination on the last objection:

Q. All you know is people said it was Texas fever?

A. Yes, sir; the veterinary surgeon—I saw him right there on the ground where the cattle was dead. That is what he pronounced it. That is all we had to go by—that is, I heard him when he was there. We were all there. He didn't tell me it was. He was talking to a gentleman standing there.

112 Q. You heard him say so?

A. Yes, sir.

Q. How many cattle was dead?

A. I don't know the number; I saw a good deal, a number of people there, and was interested and went to see what was going on. It was just simply—we were herding our cattle that we had brought up out beyond there and we went to see what it was.

Q. That is your experience in Texas fever up to 1891?

A. Yes, sir; that is what I said.

Redirect examination:

Q. You are speaking now of the cattle that you said had the Texas fever in Kansas?

A. Yes, sir.

Q. When was that?

A. It was either in '70 or '71. I won't be positive it was either year.

Q. Did these cattle die with the disease; were they Kansas cattle?

A. Yes, sir.

Q. Or were they Texas cattle?

A. Kansas cattle.

Q. Do you know whether that disease, whatever it may have been, was communicated to one herd or more?

Objection by defendant as calling for a conclusion and incompetent, immaterial, and irrelevant. Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. Did any cattle, so far as you know, in Kansas at that time die with that particular disease except the cattle that came in contact with this Texas cattle?

Objection by defendant for same reasons as last above.

The COURT: I don't understand yet the witness to say that any Texas cattle was brought there.

A. Yes, sir; I said at the beginning—I said I was herding cattle there, and that is the way I found it; herding the Texas
113 cattle; came up from Texas with the cattle.

The COURT: You brought cattle up from Texas?

A. Yes, sir.

Q. Did the cattle you brought from Texas communicate the disease to the Kansas cattle?

A. No, sir; it was a herd that came from Goliad county, Texas; that I brought came from the northern part.

The COURT: Did you see those that were brought up from Goliad?

A. Yes, sir.

Q. Were they diseased?

A. You cannot tell it on them. Where they graze there, Texas cattle *cattle* graze, you cannot tell it in them at all. It is where these Texas cattle graze along.

Q. These Texas cattle, if I understand you correctly, don't have the Texas fever themselves, no matter where they go, do they?

A. No, sir.

Objection by defendant as calling for the conclusion of the witness. Objection overruled.

Q. These Texas cattle came from Texas up to Kansas. After these Texas cattle that you speak of brought the disease there, did these Kansas cattle have it with coming in contact with them?

A. Yes, sir.

Objection by defendant — incompetent and immaterial. Objection overruled.

A. Yes, sir; they did; they crossed on the same land where the Texas cattle crosses; a wire fence will keep it off.

Q. Do you know from what part of Texas these particular cattle came to Kansas?

A. They *they* came from away down what we call King county.

Q. Do you know how the name of Texas fever originated?

A. No.

114 Q. That was your first knowledge of it back in '73 and '74?

A. Yes, sir.

Q. Did you notice at that time some or any of the symptoms of that disease were in the cattle—either before or after they died?

A. I did. I noticed a sick one.

Q. What was some of the symptoms?

A. They will stand there and fight, and their ears will lop, hair stand up, and the urine is a little bloody.

Q. State whether in that condition if they attempt to be vicious or not.

A. Yes, sir; they will fight you.

Q. Do you know when those particular cattle belonging to the Western Union Beef Company arrived at Iliff?

A. Yes, sir.

Q. Where were you at the time that they arrived there?

A. Our camp was four miles west above there; above the river.

Q. How close is that, Iliff, to that ranch of McPhee and Mullen, or range?

A. We camped up to about four or five miles below Iliff.

Q. Just three, four, or five miles of Iliff?

A. Yes, sir.

Q. And these cattle were unloaded at Iliff?

A. Yes, sir.

Q. How soon, or how do you know they were unloaded at Iliff?

A. I saw them in the pen; was sitting on the pen, talking to Judge Brush.

Q. That is when they were being unloaded?

A. That is when they were branding them right there.

Q. Were they unloaded and branded as soon as they arrived there?

A. Yes, sir.

Q. Where is Iliff on that map there?

A. Here (indicating).

(JUROR:)

Q. Where does your ranch end?

A. Here is our home ranch (indicating).

(JUROR:)

Q. Where does it end in connection with that?

A. Comes in about four miles. This is our land—this spot in here (indicating).

Q. They were unloaded within about how close to your own place?

115 A. Of our ranch? It is about three or four miles.

Q. And where were your cattle at the time?

A. Some right at Iliff; running around there at Iliff on the north side of the river.

Q. On and near your range?

A. Yes, sir; they run all over that country on that side. I aim to keep them—

Q. State what was done with these cattle.

A. I only stated that I always talked with Judge Brush. He got on a horse and rode with me. They were branding them and turning them across the river just south of the town.

Q. And the ranch of McPhee and Mullen was on the north side of the river?

A. On the north side.

Q. What was the condition of the water in the Platte river at that time?

A. There was water in all the channels, but sand bars in the places, and streams be that deep (indicating), and some places six inches or a foot deep in the channel.

Q. Was there much or any running water?

A. There was some water in the channel; there is sand bars all between.

Q. They simply drove them across on the south side of the river?

A. Yes, sir.

Q. State what, if any, facilities the Western Union Beef Company had for taking care of their cattle.

A. At that time had all their men there at that time, but they were going to go to Brush to brand.

Q. What was the brand of Mullen and McPhee; the general brand?

A. Box J.

Q. What do you know, if anything further, was done by Mr. Brush or the Western Union Beef Company with their cattle after that?

A. I never saw anything.

Q. Didn't see them again?

A. No, sir; I didn't see no parties doing anything to the cattle.

116 Q. At the time, but just previous to the landing of these cattle there—about what time were they landed there?

A. They were branding on the 19th day of June that I was in the pen.

Q. How many were there?

A. I didn't learn. There was two shipments they told me, twenty-eight in the two shipments. There was a shipment to come in on the 20th, and I was there on the 19th, and shipment was to come in on the 20th.

Q. How much did the two shipments make?

A. Twenty-eight in all. I only know just what Judge Brush told me when we were sitting on the rail, talking.

Q. Do you know where they came from?

A. He claimed they came from Kimble county; I asked him; Mr. Brush told me.

Q. In Texas?

A. Yes, sir.

Q. Kimble county? Had the Western Union Beef Company any

cattle in that neighborhood before the arrival of these cattle from Texas?

A. They probably had a hundred or two there that was running with our cattle.

Q. What did you do with the hundred or two?

A. They stayed there around and part of them died.

Q. Is that all the cattle they had there?

A. Right at that time they had moved all their cattle.

Q. I will ask you, then, immediately then or previous to that.

A. Before that; they had moved them west; they moved them up the river.

Q. I asked you did they have them there in that neighborhood—these cattle that you are talking about?

A. They had at the time they turned them loose; they had about one or two hundred head of cattle.

Q. Just previous to that?

A. Had a good many more.

Q. How many?

A. I don't know. I expect a thousand or two, scattered on the range.

117 Q. In the neighborhood of your cattle?

A. No, sir; on the south side; their cattle is all on the south side.

Q. How far from you?

A. Just the river between.

Q. Is not that in the neighborhood?

A. Yes, sir.

Q. What had they done with this one hundred head of cattle?

A. Put them up west.

Q. How long before the arrival of these Texas cattle? How long before that had they moved them up west?

A. I could not say, because I was gone.

Q. You don't know?

A. No, sir; I don't.

Q. How far west did they move them?

A. Oh, about twenty-five or thirty miles.

Q. Can you form any idea, any approximate idea, of how long it was before the Texas cattle came up?

A. No, sir; I can't; could not tell at all.

Q. Do you know whether it was a month or a year?

A. Yes, sir; I know it was less than a year. I would not be positive whether they moved them away in May or early in the fall. I believe it was early in the winter; I won't be positive, for it was either in November or in May—April, I would not say.

Mr. BRYANT: You say you were away?

A. I was away in the spring on the round-up.

Q. When did you get back from the round-up?

A. In June.

Q. Do you know what, if any, steps were taken by Mr. Brush or the Western Union Beef Company to keep their cattle separate from the other cattle in the neighborhood—what efforts were made?

A. They never made any that I ever saw.

Q. After returning, in June, did you stay there the balance of the time?

A. Yes, sir; I was there.

Q. What were the facilities for watering cattle there except from the river, if any, and these springs that you speak of?

A. Not any; on our side of the river there is some slues, but that is outside of the river. There is no—

Q. So the cattle have to come to the river to get water?

A. Yes.

Q. State if you know whether from the time of the arrival of these Texas cattle on the 19th and 20th of June they associated with or mixed up in contact with your or came in contact with cattle any.

A. They came in contact with ours, I know.

Q. Did they continue to do so until the breaking out of this disease which afterwards became known?

A. Yes, sir.

Q. Was there any effort on the part of—but you have answered that question already as to separating them or moving them from that neighborhood. You have said that before the breaking out of this disease, to which we will come presently, that they made no effort, so far as you know, to separate the cattle?

A. They never made any, because I tried it myself. I kept them back all I could myself.

Q. What was the first that you heard of this disease?

Objection by defendant.

Q. Did any disease break out among these cattle of yours or Mullen and McPhee's?

A. Yes, sir.

Q. And, if so, when, as near as you know?

A. The first I knew of it was in August, but there had been some cattle die. I saw them travelling on the railroad. I saw one or two along the railroad, dead. The first time I saw it was in August. I saw the Texas fever.

Q. About what time in August did it come to your knowledge?

A. Some time between the 10th and 15th of August. I cannot be sure.

Q. You stated that at that time a number of cattle died with it?

A. Yes, sir; I could see cattle dead with it—were dead. I didn't know what was the cause of it at the time I was on the cars.

119 Q. Up to that time or prior to that time do you know how many cattle had died?

A. No, sir.

Q. You don't know of your own knowledge exactly when the fever or when this disease first took hold of these cattle?

A. I don't.

Q. Did you make an examination after you became aware of this disease?

A. Yes, sir; by looking at the cattle—going and looking at the cattle—a sick one.

Q. Did you notice the symptoms of them?

A. Yes, sir.

Q. State how these symptoms compared with the symptoms of the cattle that you spoke of in Kansas as dying with the Texas fever.

Objection by defendant.

Q. Well, state the symptoms.

A. The symptoms of these cattle—they would just stand around there and droop. If you go around them they would fight you and the ears would drop down and hair would get rough, and, if you notice, the urine is bloody. That is all the symptoms I could see to them; right away try to fight you.

Q. They were the same symptoms as existed in the cattle at Texas?

A. Yes, sir.

Q. Did you examine more than one?

A. I examined twenty or thirty, just moving them around.

Q. What did these cattle that you have spoken of die with, those as being diseased? What disease did they die with?

Objection by defendant as not proper foundation laid to show the witness's competency to testify.

Q. Didn't I understand you to say—

A. You asked me if I noticed the sick ones—how many sick ones. You didn't ask me how many dead ones. I examined twenty or thirty sick ones. You asked me how many sick ones.

120 Q. Did you examine or see any dead ones?

A. Yes, sir; I saw them and counted them, over a hundred.

Q. I will ask you, from your knowledge of the symptoms in Kansas, the cattle that came from Texas and these symptoms, what disease they died with.

The COURT: He may state—I don't know that he may name the disease. He may state whether they died with this disease that he saw them sick with. You say you saw them with their ears drooping and bloody urine and rough hair and disposed to be vicious. Was it from that sickness that they died, those that you have spoken of as having died?

A. Yes, sir; just from that.

Objection by defendant, as the witness has not shown his competency to testify.

Q. I will ask you to state if you had any conversation or conversations with Mr. Brush.

A. I never saw Mr. Brush after we were branding until we had a meeting—until about the 4th or 5th of October.

Q. I asked you if you ever had any conversation or heard him express any opinion about it.

A. Yes, sir; I did.

Q. That, you say, was about the first of October?

A. Yes, sir; either the 4th or 5th of October.

Q. There was a meeting there?

A. Yes, sir.

Q. What kind of a meeting?

A. Just a meeting to settle about these cattle altogether; all the losers were there, and Mr. Brush came down himself.

Q. What did Mr. Brush say, if anything, about this disease?

Mr. BRYANT: I would like to ask one or two questions.

Cross-examination:

Q. You say it was a meeting to settle this question?

A. Wanted to see what they could do.

121 Q. Compromise and settle it?

A. I reckon that is what it was, to see what the Western Union Beef Company was going to do; I don't know if they were going to compromise or settle, but to get the money for the cattle.

Q. In a meeting of the cattlemen to arrange the differences and settle between all of them?

A. Yes, sir.

Objection by defendant to the conversation being given by the witness.

Mr. MARKHAM: We don't ask for any offers or compromise; just ask if Mr. Brush expressed an opinion as to the disease.

The COURT: You may inquire a little further. Of course, anything that was said while they were attempting to compromise and settle their difficulties is privileged. It is incompetent to go to the jury; he may have expressed an independent opinion; if that be true, it is competent.

(Mr. MARKHAM:)

Q. Was this in a conversation with you or in a general talk, or how did it come about?

A. It was in the meeting, in the room.

Q. And he was expressing an opinion to all of you?

A. Yes, sir; to all of them.

Mr. MARKHAM: That has nothing to do with the terms of the compromise.

The COURT: I don't know whether it has or not until I hear what is said and what was going on at that time.

Recross-examination:

Q. You were all in the room?

A. Yes, sir.

Q. And discussing the question of settling these losses of cattle?

A. I don't know whether it was; I didn't have much to say; I just sat there listening.

Examination by the COURT :

Q. Who were at that meeting ?

A. Mr. Powell and Mr. Jordan was there and myself and
122 Mr. Ford ; four parties here that was at that meeting.

Q. Who represented Mr. Mullen and Mr. McPhee ?

A. Nobody at that meeting. I come in to go to Ft. Collins, and met Mr. Jordan ; was there together, and just stepped over there and went into the meeting.

Q. Who called it ?

A. I think the county commissioners ; I ain't certain ; probably the people who lost the cattle around in that vicinity.

Q. Were you authorized at that time to settle any claims that Mr. Mullen and Mr. McPhee had ?

A. No, sir ; I was not authorized to settle anything. I was just coming up to go to Ft. Collins.

A. Was there anybody else, so far as you know, authorized to settle ?

A. No, sir ; t'ey never authorized anybody to settle there, except this meeting.

COURT :

Q. You may answer.

To which ruling of the court the plaintiffs duly excepted. Objection overruled.

Redirect examination :

Q. I will ask you, now, if he did say what disease it was.

A. Yes.

Q. What disease did he say it was ?

A. He said it was the Texas fever.

Q. Do you know what, if any, effect the condition of the soil and grass has upon the length of time in which this disease will communicate itself to other cattle ? Do you know whether it has any effect ?

A. Well, if it is wet——

Objection by defendant as calling for the conclusion of the witness.

Q. I will ask you if you know.

A. I do.

Q. What, if any, effect has it upon hastening or delaying the breaking out of the fever ?

Recross-examination :

123 Q. How do you know it ?

A. I know from experience in Kansas, they way they used to quarantine.

Q. That one summer ?

A. No, sir ; quarantine four or five summers.

Q. Quarantine you, so you won't get the fever ?

A. Quarantine us to keep us from giving them the fever. We had the Texas fever.

Q. All you know is what they told you of the quarantine regulations?

A. All they told us, except they got after us with the shotgun.

The COURT: He may answer now.

Objection overruled.

A. Yes, sir. When the weather is cold, or damp, or sloppy and rain, it will keep it off; when it is right dry it will come on right off; whenever there is water on the ground it will stave it off, or cool weather.

Redirect examination:

Q. So, if the weather is moist, and the grass, it will delay it?

— Yes, sir.

Q. And won't appear anything as soon as if the weather was dry?

A. Yes, sir; dry and hot.

Q. What was the condition of the weather in the neighborhood of McPhee and Mullen's ranch, in that region of the country, along about the 19th and 20th of June, and from there on?

A. Plenty of rain and plenty of grass and water. The sluiceways were all full and on the north side of the river.

Q. And that, you say, would delay the breaking out or ravages of the disease?

A. Yes, sir.

Q. Cool weather does have some effect?

A. Yes, sir; cool weather will stop it. Frost will stop it.

124 Q. How was the weather?

A. Cool and rainy all the time; nearly big rains.

Q. Have you any definite recollection now about how long that condition of the weather continued?

A. Yes, sir; mighty near all that year. We had much rain that year and early frost that year.

Q. All that month of June?

A. June, July, and August; it rained up until fall.

Q. What became finally of these cattle belonging to the Western Union Beef Company that you say were brought up there from Texas?

A. That year I moved mine; I rounded the steers all up and took them up and turned them out on Judge Brush's ranch; I moved mine and then -is.

Q. Whose?

A. Judge Brush; moved his back—that is, on his side of the river.

Q. Did you move them to get them out *out* of the way?

A. Yes, sir; to get them out of my way.

Q. How many of them did you move over there?

A. About two thousand.

Q. About what time did you move his cattle, the cattle of the beef company, over there?

A. I moved them just as soon as we found out that they had the fever. We rounded them up and would take them across the river, and the next day they would come back again.

Q. Do you recollect what time that was?

A. I think that was in August.

Q. Do you know whether it was August or September?

A. It was along the latter part of August or first of September; I think about the last days of August, after we first commenced, after I telegraphed Mr. Mullen. I think the next day I went home and moved Judge Brush's cattle.

125 Q. After you telegraphed him?

A. Yes, sir; I moved his; I thought it would keep it out by moving his cattle after I could not move my own.

Q. Can you state whether these cattle that were so brought up there, you say, from that part of Kimble county, Texas, whether they came in contact with other cattle besides Mullen and McPhee's?

Objection by defendant as incompetent, immaterial, and irrelevant.

Mr. MARKHAM: I want to show that it spread the disease wherever they went; that all the cattle that came in contact with them got it.

The COURT: Otherwise, there may be a contention that it broke out spontaneously in your own cattle.

Objection overruled.

Q. They did come in contact with other?

A. Yes, sir.

Q. You have said that the cattle of McPhee and Mullen took this disease or had it. Did any of them die, any of McPhee and Mullen's?

A. Yes, sir; I counted one hundred and twenty that I could count and swear to, but there was other cattle that I could not, on account of having died, and being dead so long the brand had been decayed and gone.

Q. Can you state some of the other neighbors there or stockmen whose cattle these Texas cattle came in contact with that contracted this disease?

A. Yes, sir; I can.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

Q. Go on.

A. They came in with Mr. Powell's—came in contact with Powell's; Jack Stimson's, who lives right there, about eight miles from there, and a man named ——— had a few cattle running there with theirs, and Mr. Charris, of Sterling. I could

126 name forty or fifty.

Q. These are some of them?

A. Yes, sir; one man named Fribourg; sixteen miles below Crook.

Q. State, if you know, whether this disease also made its appearance among the cattle of these men whose names you have mentioned.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. Yes, sir; it was mixed with them all through.

Q. The disease broke out or appeared among the cattle of all these men?

A. Yes, sir.

Q. About what time?

A. I don't know. I know it was in August was the first I knew of it.

Q. Did you see some of the cattle that was sick of these different people that you have mentioned?

A. I did, some of them; yes, sir.

Q. Did they have—these cattle of these particular people have the same symptoms of disease that you have already enumerated?

A. Yes, sir.

Q. Do you know whether some of the cattle of all these men that you have spoken of died from this disease?

A. I do. I seen a great many of them right down on the prairie as well as alone. I saw the cattle and know the brand.

Q. You say you have been in that neighborhood or on that range since 1887?

A. Since 1887. I went there on the 13th day of December, 1887.

Q. Did the cattle, either on your range or any of these others, as far as you know, during the entire time of 1887 to 1891, have any disease of this kind?

A. No, sir; there was not; no disease of the kind there.

Q. No such disease as that?

127 A. No, sir; had no cattle die of any disease, only a few might have died with colic.

Q. Did any disease of that nature appear in that region of country since that time?

A. No, sir.

Objection by defendant as incompetent, immaterial, and irrelevant.

Q. With reference to the cattle of Mullen & McPhee's in 1891, what kind of cattle were they? I mean as to American cattle as distinguished from Texas cattle. What proportion were American cattle?

A. They were mostly American cattle.

Q. As distinguished from Texas cattle?

A. Yes, sir; what we call native cattle.

Q. Do you know anything about the number of cattle of Mr. McPhee and Mullen that died at that time?

A. Yes, sir; I only know what I counted. I counted—hundred

and twenty that I counted ; but there was other cattle died that we could not tell what they were ; they may have been ours and may not have been. About eight hundred altogether right in there on the prairie, over for six or eight miles around.

Q. Eight hundred that died ?

A. Yes, sir ; that died around there in that vicinity for ten or twelve months ; I saw the most of them.

Q. I will ask you to state whether or not you had any instructions from Mullen & McPhee or whether it was a part of your duty to keep count of the number of cattle that died and expenses, etc., in regard to this place.

A. Yes, sir ; I did.

Q. You say there was about — hundred and twenty head of cattle that you counted and recognized as the cattle of McPhee and Mullen ?

A. Yes, sir.

Q. Could you tell within what period of time, the space of time, these cattle had died ?

A. Why, they were dying for over a month. Just as soon
128 as I got that from Mullen he told me to keep count of it.

Objection by defendant as incompetent.

The COURT: State whether you kept an account of it.

A. Yes, sir ; I kept an account of it.

Q. And that was within a period of about how long a time ?

A. For a month, until I left off.

Q. Was there any other complaint or disease or anything of which these cattle could die at that time, to your knowledge, except this disease ?

A. No, sir.

Q. You said about a hundred and twenty head you found ?

A. Yes, sir.

Q. How did you recognize these as the cattle of Mullen and McPhee ?

A. By the brand.

Q. You say there was others that you found that you didn't make any count of, and what was the reason you gave that you did not count them ?

A. You could not recognize the brand. They would lie with the brand on the ground, so that — you turned it over it would stick to the ground. The worms would get in the brand and eat it out, and you could not tell what it was.

Q. You recognized that number by the brand ?

A. Yes, sir.

Q. And do you know the number that you could not recognize ?

A. No, sir.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection sustained ; to which plaintiffs duly excepted.

Q. Where were these cattle that you found and recognized as the

cattle of McPhee and Mullen; about where, with reference to that country?

A. Well, they were scattered right above Iliff, to right above Crook. When the cattle were unloaded they were run right
129 in here in Iliff, and they were dead right there through to Cedar Creek farm on down to this side of Cook.

Q. To what distance?

A. About twenty miles from Cedar creek to Cook. There was nothing below Cook, about twenty miles.

Q. All these cattle were all on or somewhere near their ranch, were they?

A. Yes, sir; on what we call the range.

Q. And you said you found in all some eight hundred dead cattle?

A. Between seven and eight hundred cattle in all.

Q. That was at the time that you were hunting for the dead cattle of Mullen and McPhee?

A. Yes, sir.

Q. Were there people hunting for dead cattle at this time?

A. Yes, sir.

Q. Who were they?

A. Mr. Greenman and Mr. Powell.

Q. Was that your business at that time?

A. Yes, sir.

Q. Do you know about how many of this one hundred and twenty that were found dead, the proportion of cows, calves, and steers?

A. No, sir; I never figured them up just the number of steers. I only kept an account of the number of bulls. I got the whole thing and only know of the bulls we found.

Q. Did you count the calves at all?

A. No, sir; never counted no calves.

Q. How many bulls were there?

A. Six bulls that I found.

Q. From your engagement in the cattle business for the last forty years, were you familiar with the price and values in 1891?

A. Yes, sir.

Q. During the summer months?

A. Yes, sir; I was.

Q. Were you familiar with the values in that neighborhood of bulls, steers, and cows?

A. Yes, sir.

Q. You didn't know what proportion of these one hundred and twenty that were found dead were steers?

A. No, sir; I don't.

130 Q. You say you did count the bulls?

A. Yes, sir.

Q. Six?

A. Six bulls; yes, sir.

Q. What was the value of these bulls?

A. They were worth forty dollars apiece.

Q. What was the value of such steers as you had and a part of which died?

A. From thirty to about thirty-five or thirty-three of five dollars; thirty or thirty-five dollars. There was a good many steers.

Q. Where did you fix the value of these bulls?

A. Right there; the bulls right there at home.

Q. Where did you fix the value of the steers?

A. On the market at home; sell them right there for right at home.

Q. Can you form any approximate idea of the number of steers?

A. No, sir; not without going over my list.

Q. Can you by going over the list; did you have a list?

A. Yes, sir.

Q. Have you got it with you?

A. No, sir; it is down to Mr. Mullen's.

Q. What was the value of these cows?

A. Yes, sir; I have it right here with me. (List handed counsel.)

Q. Is this a list of the cattle that died?

A. Yes, sir.

Q. When was this list made out?

A. February.

Q. Made it in February of next year, '92?

A. Yes, sir.

Q. What did you make this list from?

A. I made it from the book we had when we were taking the number of cattle down.

Q. Have you looked over the list?

A. Not since I sent it up.

Q. Did you look it over at the time it was made?

A. Yes, sir; and swore to it. I made a list and swore to it.

Q. Look at that list now and see if you can tell how many steers and how many cows.

131 Objection by defendant to the witness testifying from that list.

The COURT: Look over the list and see if you can recollect how many steers there were.

Q. I just want you to tell me, if you can, from that list.

A. Yes, sir.

Q. I will ask you, Mr. Matthews, to look at that paper and state—refresh your memory from that paper and state how many steers there were.

Cross-examination:

Q. Are you simply swearing what you see on the paper?

A. No, sir. I am simply swearing to what I saw on the prairie. I made this thing out myself and put it into the book, and then made this out and swore to it before a notary public at Sterling. I made this from my book made on the prairie.

Q. You are testifying from that list what you recollect?

A. I say I know what is on this paper; I saw it.

Q. You have not any recollection now as to the number except what you see on the paper?

A. If I can go and get the book, I can tell.

Q. You get it from the book and paper?

A. I get it from the book and paper; that is where we kept everything.

Q. You think it was correct at that time and get it from that?

A. I do.

Objection by defendant to the witness testifying as to the number of steers, as he has no recollection of the matter aside from the paper.

Redirect examination:

Q. Look at that paper. After looking at that paper, then from your recollection can you state how many steers were there?

A. Not without I count them. I would have to count them
132 on this paper.

Q. After you have counted them from the paper could you then recollect?

A. Yes, sir.

Q. That was the number that you found there?

A. Yes, sir; because we took them separate—cows and steers and bulls. Everything was put down separate on the book.

The COURT: Looking over the list that you have and counting them up, will that recall to your mind how many bulls you saw and how many steers and how many cows and how many calves?

A. Yes, sir. We didn't see any calves. I could tell the cows by taking time to look over it; have to go over the whole thing. I have got each thing separate for each of the day's work.

The COURT: Will this recall to your mind so that you can testify?

A. Yes, sir.

The COURT: I think that is competent.

Objection overruled; to which ruling the defendant then and there excepted.

Q. Do you know anything about the shipment of these cattle?

A. I do.

Q. Do you know anything about the number of beef cattle that you had ready to ship?

A. Yes, sir.

Q. And you knew why they were not shipped?

A. Yes, sir.

Q. About how many beef cattle were there that you did not ship?

A. I think, to the best of my recollection, between five and six hundred that I had placed on down on what we call the Powell place—a big pasture. I put them down there to have them ready and shipped from Crook all I could. I put everything on what we

call the Powell place and kept them there. To the best of my recollection, from five to six hundred that I had there ready to ship at any time.

133 Q. Can you state why these cattle were not shipped—these beef cattle?

A. Because of the Texas fever that had broken out; and if I did ship a train-load of three or four hundred, one would have laid down and died, and they were left to it, and go into Omaha with them and been quarantined in Nebraska, and probably the whole herd would have been confiscated and we sued for damages. That is the reason they were not shipped.

Motion by defendant to strike out as incompetent, immaterial, and irrelevant. Objection and motion denied.

Q. When were these cattle shipped that you could not ship on account of the fever?

A. The last days of October or the first days of November; after the frost.

Q. State whether or not that was as soon as they could be shipped.

A. Yes, sir.

Q. Why did you say that—after the frost?

A. Because the frost killed it. The quarantine laws is always raised after a good frost—the second of November or the first of November. They always raise after a big frost, which will kill it.

Q. Quarantine were raised at that time?

A. Yes, sir.

Q. What effect did the frost have on this disease?

A. It killed it right out. I don't know; it only stops it.

Q. Were you acquainted with values of these beef cattle that you shipped just before the disease?

A. I was in Omaha and counted them in the car and went to Omaha with them and saw them weighed and checks made out and everything.

Q. Did you superintend—

A. I suprintended the business myself. I go with every train and count every cow.

Q. What was the value of these beef cattle shipped just before the fever appeared?

134 Objection by defendant.

The Court: Those that you shipped away shipped in June?

A. Yes, sir; June and July.

The Court: When was it that you cut out this five hundred or six hundred and got them ready to ship?

A. I shipped in July the last shipment before we found out the Texas fever had broken out there, that we knew it.

The Court: When did you cut out this five hundred or six hundred head for shipment?

A. I cut them out in June and shipped them down below. I generally ship all my cattle in July, August, and September, but

sometimes I shipped five, more or less, and sometimes I shipped ten and sometimes twenty to the market.

The COURT: When did you intend to ship these five or six hundred head that you afterwards shipped?

A. Just as soon as I could run them out.

Q. Can you tell when it was?

A. Any time in August and September. I intended to run them out in that time. After the fever broke out I said——

The COURT: If he knows what the value was when they intended to ship, and tell what it was at the time they shipped.

A. They were worth from thirty to thirty-five dollars.

The COURT: At what time?

A. At the time I was shipping, was ready to ship.

Q. You mean the beef steers?

A. Yes, sir; hundredweight, \$3.35 and '45, \$3.30 to \$3.45.

Q. Do you include in that cows?

A. No, sir; that was steers, and cows about \$2.50 or \$2.25.

Q. They were the only kind you shipped, beef steers and cows?

A. Yes, sir.

Q. What was their value of such cattle at the time that
135 you did ship them?

A. From about \$22 to \$25.

Q. You mean beef cattle?

A. Yes, sir; that is beef cattle.

Q. Cows?

A. Cows, about \$1.50 or \$1.75 a hundred. That would make them from about \$12 to \$14.

Q. Do you know how many steers there were? I mean that you shipped in that way after the steers?

A. Yes, sir.

Q. I mean how many steers there was that you were prevented from shipping on account of the disease, but did ship after the steers?

Mr. BRYANT: Our objection goes to all this testimony.

A. There was close to four hundred steers that I did not ship out.

Q. And the balance?

A. Was cows; yes, sir.

Q. What is the shipping season among cattlemen on your range and in that neighborhood?

A. July, August, and September.

Q. Does it ever run later than that?

A. Yes, sir; I have in November, the last of November.

Q. Do you know anything about any calves dying or whether or not any died?

A. Yes, sir.

Q. Belonging to Mullen and McPhee?

A. Yes, sir.

Q. I thought I understood you to say that you did not know how many calves actually died from this disease.

A. No, sir; I don't know, only I took them all down, everything.

I counted everything that had the box J brand on, and got down and looked at them myself, and told the age as near as I could, and the color.

Q. Do you know whether the mothers of any calves that you had died with this disease?

A. I do.

Q. Do you know anything about how many calves were left in that condition?

A. Between forty and forty-five that stood around there on the prairies.

136 Q. Could you tell from the action of the calves whether they were motherless or not?

A. You can tell a motherless one quick.

Q. The same as you could tell a motherless child?

A. Yes, sir.

Q. Do you know how many of these calves that were in that condition died?

A. No, sir; I know how many were saved.

Q. How many did you have?

A. We saved nineteen out of about forty or forty-five.

Q. You saved nineteen out of forty or forty-five?

A. Yes, sir.

Q. What became of the others?

A. They died.

Q. Why did they die?

A. None of them had teeth and were too small to eat grass.

Q. Approximately, how many calves died on that account?

A. Twenty to twenty-five.

Motion by defendant to strike out the testimony as to the number of calves as conjectural. Motion denied.

Q. What was the value of such calves?

A. Six to seven dollars.

(2 P. M.)

Q. Did you make a different calculation of how many different kinds of cattle there was, steers, etc., you said you would?

A. Yes, sir.

Q. Can you tell how many there was?

A. Yes, sir.

Objection by defendant. Objection overruled.

Q. That is, as to the number that was found dead?

A. Yes, sir.

Q. How many were there of each?

A. There was six bulls, eighty-five cows, and twenty-three steers.

The COURT: Belonging to these plaintiffs?

A. Yes, sir.

Q. Do you know of the value of the cows, then? Did you fix that this morning?

137 A. We didn't fix the value of the cows this morning; no, sir.

Q. Fix the value of the cows.

A. Worth from fifteen to twenty dollars.

Q. During the prevalence of this fever there, did you know of any cattle or herds of cattle or cattle which were kept separate and apart out of the reach of this Texas cattle?

Objection by defendant. Objection overruled.

Q. Do you know of any such cattle?

A. I did.

Q. State if any of those cattle that were so kept out of the reach of the Texas cattle were infected with this disease, as far as you know.

A. They were not.

Q. Can you mention some of the instances of some people's cattle which were so kept?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

The Court: Give the names and it enables you to better examine him.

A. Mr. Dillon and Mr. Reser had some cattle right there, just a wire fence between them, and he never lost a cow, and I had thirty head in my own batch at home, and there was never one of Judge Brush's cows in there, and I never lost any neither, and I know of some up there that they didn't get to that didn't die. Mr. Hatfield.

Q. You have already testified something about moving the cattle of Mullen and McPhee, or some of them, to some other range, in order to keep them away from this disease. Didn't you say that you did move them? How many cattle did you so move about?

A. I moved, well, nearly all we had; from thirty-five—at least thirty-five hundred or four thousand head of cattle, because I had

Mr. Powell's cattle mixed up with them.

138 Q. And your object in so moving them was to get them away from this disease?

A. Yes, sir.

Q. About when were these cattle moved?

A. Moved them the middle of September.

Q. How many miles was it that you moved them?

A. I moved them just about three miles—that is, from the lower end—and we moved them about ten miles from the west end of our range.

Q. Moved them, in all, about ten miles?

A. About twelve miles north.

Q. Have you any idea or any knowledge of the cost and expense of moving these cattle?

A. Yes, sir. It has taken me about four —

Objection by defendant, as the damages under this head are too remote. Objection overruled.

Q. About how much was the expense of so moving them?

A. About two hundred and fifty or three hundred dollars; somewhere along there.

Q. What did this expense consist of?

A. Labor.

Q. How many men did it require?

A. I used my whole outfit—eight men, my wagon and team.

Q. How long did it take to move them?

A. It takes four days to move them only. We still kept them there, in order to keep Judge Brush's cattle from ours. They would come right down and go to ours.

Q. So you had to keep the men there?

A. Had to keep the men right there all the time.

Mr. BRYANT: I understand part was moving cattle away and part to keep ours away.

Q. How much was the expense, as near as you can get at it, for moving them?

A. I suppose, too, that would be a part of the expense of moving them.

139 The COURT: I will hear the evidence on that.

Q. State how long you kept these men there.

A. I kept them there until about a month—until they were all moved out.

Q. What was the effect of moving them up there, so far as the disease was concerned?

A. Because they quit dying a little bit.

Q. Did they stop dying after you moved them up there?

A. Yes, sir; except just for a few that was sick when we moved them up there.

Cross-examination:

Q. You have been there since 1887, I understood you to say, and they have about four thousand head of cattle in their herd.

A. They did in 1891. They haven't so many now.

Q. They had, then, in the month of June, 1891, about four thousand head?

A. Yes, sir.

Q. You say mostly Americans. What proportion of them were Texas cattle, would you say?

A. About a third.

Q. That would be about fourteen or fifteen hundred Texas?

A. Yes. About a third; yes, sir.

Q. And you say some of these cattle were bought the year before?

A. All of them bought the year before.

Q. The whole outfit was bought in 1890?

A. Yes, sir; Texas.

Q. Do you know whereabouts in Texas they were bought?

A. I bought them myself down the Arkansas river.

Q. In Texas?

A. No, sir; in this State.

Q. In the southern part of the State?

A. Yes, sir.

Q. And brought them up?

A. No, sir. I had a contract to deliver them to the ranch.

Q. That was about fourteen hundred head, you say?

A. Yes, sir.

Q. Were they mostly steers or all steers?

A. All steers.

Q. What was their ages?

A. There was twos, threes, and fours.

140 Q. And the four thousand were what you were selling that year?

A. Yes, sir.

Q. What you aimed to sell?

A. Yes, sir.

Q. How many beef cattle did you have?

A. In that herd?

Q. In that herd, on the 19th of June, ready for market?

A. I shipped a little over eleven hundred, and there was a little over eight hundred beeves shipping steers. I shipped over eleven hundred, and I shipped about three hundred, and the balance was steers.

Q. Would you say that you had eleven hundred cattle ready for shipment in that year?

A. Not already for shipment. They hadn't got all fat in June.

Q. And you made your first shipment about the 25th of June?

A. Twenty-second.

Q. When they were shipped from Crook?

A. Yes, sir.

Q. What did that outfit consist of?

A. It consisted of all American steers, but seven cows, fifty head in that lot.

Q. Forty-three steers and seven cows?

A. Yes, sir.

Q. That was the outfit that Mr. Mullen has testified to as to price?

A. Yes, sir; that is the first lot.

Q. You intended to ship right along from that time on, did you?

A. Yes, sir; just as soon as we got through with the round-up; we hadn't got all through the round-up, but I was home and just made a shipment.

Q. You were at home on the 19th of June, and was Mr. Brush? Where were these beef cattle got at that time?

A. There was a few of them right at Iliff.

Q. Where was the bulk of them?

A. The bulk of them was down below what we call the Powell place.

Q. Where is the Powell place?

A. It is about six or seven miles of Iliff, northeast.

141 Q. That is down the river?

A. Down the river.

Q. Right there (indicating on map) is Powell's land?

A. Yes, sir.

Q. How far is it from Iliff to Crook?

A. Sixteen miles.

Q. That is how far below Iliff?

A. About six miles.

Q. Ten miles above Crook; that is about where your land is?

A. No, sir; our land comes right up there—right in here (indicating on map). We commence two or three miles above the town.

Q. Mr. Brush helped you to pick out these that you shipped?

A. Only four of five out of the bunch, right at the round-up at Iliff.

Q. He was there the day you shipped?

A. No, sir.

Q. He was helping you then to pick out some to ship?

A. Yes, sir.

Q. You didn't see him again until October?

A. Not as I recollect.

Q. Did you notice the condition of the river the day that you talked to Mr. Brush, the 19th day of June?

A. Yes, sir; I know it every day. We came right along by the river that night.

Q. Wasn't it pretty full, the channels?

A. No, sir; it was not; water some places that deep (indicating) and some channels was not.

Q. What do you call the channel; where the water was running?

A. Yes, sir.

Q. That was filled up?

A. Yes, sir; the channels are full. There would be big sand bars between these channels. There may be twenty channels across the river.

Q. There was a continuous stream of water running down and somewhere from eight to ten of them?

A. Some places.

142 Q. How wide is the river there?

A. Half to three-quarters of a mile.

Q. There was plenty of water in the river all that year?

A. Not what you would call plenty of water; enough for cattle—

Q. Didn't you testify it rained?

A. But the rain didn't have any effect on the river.

Q. Didn't affect it at all?

A. No, sir; not a bit down there.

Q. Don't you know, as a matter of fact, that some of these cattle had to be held by Mr. Brush for a day or two to let the water go down?

A. No, sir; there was none ever held that I know of or saw.

Q. Don't you know that some of them had to swim across the river?

A. No, sir; I don't.

Q. As far as you saw there that day, they were branding cattle and driving them across the river?

A. I didn't say driving across. They were branding.

Q. What was done with them then?

A. I don't know; I wasn't there. I saw the cattle on the next day down the river on our place.

Q. Where did you see them the next day?

A. I saw some of them at what we call the Lone spring.

Q. Where is that?

A. About twelve miles from Iliff, on the north side of the river.

Q. They got twelve miles by the next day?

A. Yes, sir.

Q. Did you recognize them as the same cattle?

A. Yes, sir; by the brand that was on them.

Q. Did you examine the brand?

A. I looked at them; that is enough.

Q. So you could recognize the brand?

A. Yes, sir.

Q. I don't suppose you remember the brand?

A. Yes, sir; I do.

143 Q. What was it?

A. Half circle; L. C. cross; half circle.

Q. And you saw some of them at the Lone spring, twelve miles from Iliff, the next day?

A. Yes, sir.

Q. What time?

A. About 12 o'clock noon I eat dinner there.

Q. How many did you see that day?

A. Eighteen or twenty.

Q. Were they running with any of your cattle?

A. Yes, sir.

Q. Where were most of your cattle at that time?

A. Most of our cattle at that time was there; right here (indicating).

Q. That is where your land commences?

A. Yes, sir.

Q. Down the river and back to the foot-hills?

A. Yes, sir.

Q. This side of the river was the Western Union Beef Company's range?

A. Yes, sir; they claim it.

Q. They own some land there?

A. Not down there, on down below the Powell place, opposite the Powell place. They got some right above Iliff; they got in below the ranch.

Q. Didn't they have eight miles along the river there?

A. Not that I know of.

Q. Near Iliff?

A. If they got it, I don't know.

Q. Didn't they have it at that time?

A. I don't know.

Q. You had about sixteen miles on the north side?

A. Yes, sir.

Q. Didn't they have about eight miles on the south side?

A. I didn't know they had.

Q. Where was this three-thousand-acre pasture of yours fenced in?

A. There is the biggest pasture right in there (indicating); what we call the Powell ranch.

Q. How much river frontage was fenced in?

A. It was off the railroad.

Q. Did you have any of your beef cattle there?

A. No, sir; not at that time. We didn't put them in there until we got ready to ship.

Q. When did you put them in there in that year?

144 A. I put them in in October.

Q. You were not ready to ship these until October? Where was your thirty-five-hundred-acre tract?

A. Right there by the station.

Q. Don't you put cattle in there when you get ready to ship them?

A. Yes, sir; I do.

Q. When you gather them to ship?

A. When I move down that far.

Q. I meant when you gather beef cattle preparatory to shipping, don't you put them in one or the other?

A. Yes, sir; I generally put them in that pasture and move them down there in that pasture.

Q. And held them until ready to ship?

A. Yes, sir.

Q. When did you drive them up and put them in one of the pastures that year?

A. I can't tell; about October.

Q. Not until October?

A. No, sir.

Q. Then you didn't have any of them in these two pastures in June or July?

A. No, sir.

Q. Or August?

A. No, sir.

Q. When did you first notice any of your cattle were sick?

A. I didn't notice it until August.

Q. About when in August?

Q. I ain't certain; I noticed some dead cattle; I didn't notice them sick for about a week.

Q. These are the cattle you saw in the train?

A. Yes, sir; driving through I saw.

Q. Where were you coming from?

A. Riding from Crook to Sterling.

Q. Sterling is below?

A. Above.

Q. Above Iliff?

A. Yes, sir.

Q. You run by them through these pastures?

A. No, sir; I didn't run through either one of them.

145 Q. I mean ranches or ranges of the Western Union Beef Company right across the river?

A. Yes, sir.

Q. Where did you see these dead cattle?

A. Right below; Powell's pasture.

Q. On your land?

A. Yes, sir.

Q. Do you remember how many you saw?

A. I saw only three or four lying dead—just outside of the railroad.

Q. Was that anything unusual?

A. Yes, sir; I never saw them before.

Q. Never saw those? That was when—in July or August?

A. About the middle of August.

Q. That is when you first noticed these were dead?

A. Yes, sir.

Q. Well, then, now when did you first notice any sick ones after that?

A. About the 30th or 31st of August.

Q. You didn't make any investigation when you saw these three or four dead ones?

A. No, sir.

Q. It wasn't such an unusual event that you looked it up at all?

A. No, sir; I never noticed; I was in the hay field and making hay; then went to Sterling to get some machinery.

Q. You were getting hay for the winter?

A. Yes, sir.

Q. When you came back then what next called your attention to it?

A. Why, they reported Texas fever down there.

Q. You heard some one say so?

A. I heard Dr. Lamb say so.

Q. Was that the last of August?

A. Yes, sir; that is the first time that he reported that.

Q. There had been nothing unusual, so far as your knowledge had been, to call your attention up to that time, except these three or four dead?

A. I was in the hay field and didn't go up to look at them.

Q. You were looking after the cattle?

146 A. I didn't look after them all the time; when we were cutting hay the cattle run over the range.

Q. You didn't get any man to look after the cattle?

A. No, sir.

Q. Got them for haying?

A. No, sir.

Q. Weren't the cattle all around there where you were cutting hay?

A. No, sir.

Q. You were not paying any attention to them at all?

A. No, sir; I wasn't looking around then.

Q. Around the last of August you say there was Texas fever there?

A. Yes, sir.

Q. Then what did you do; go out and look at them?

A. Yes, sir; I did every day from there on.

Q. Tell us what you saw the first day you went out.

A. The first day I went out I saw some dead cattle, and I saw some sick cattle.

Q. Where did you see the dead ones?

A. The first ones I saw at what we call the Lone spring. That was my first trip; right there (indicating). The next day I went up to the Powell ranch, and I saw one there.

Q. How many did you see there?

A. I don't know how many I saw there that day.

Q. How many sick cattle did you see?

A. I saw five or six.

Q. How many well cattle did you see?

A. I didn't take any notice of these.

Q. You saw plenty of those?

A. I saw plenty of cattle.

Q. A great many? There was only five or six out of the number that you saw that were sick?

A. Just in one day's ride—I could not see all the cattle in one day.

Q. Can you tell us how many well ones you saw?

A. No, sir. I was not looking at the well ones, but looking for dead ones.

Q. Did you see five hundred cattle there?

A. I may have seen five hundred and might have seen more or seen less.

147 Q. Would you put it at least five hundred?

A. Yes, sir.

Q. And out of that bunch only five or six that were sick?

A. No, sir. That is when I first noticed it. There may have been more. I just saw the sick ones standing around the water.

Q. I that what they do?

A. Yes, sir; they get around the water every time.

Q. If the rest of them had been sick they would have been around the water too?

A. I didn't examine all of them.

Q. You say how many dead ones?

A. I told you I didn't know how many dead ones; I didn't keep track how many.

Q. Give us your best judgment.

A. From fifteen to twenty-five, just with the one day's ride.

Q. Did you make any examination of them?

A. No, sir; just rode up and looked at them and see whose they were.

Q. You didn't examine to see the cause of the death?

A. A man looking at the sick ones could tell the cause of that.

Q. You didn't examine any of the dead ones?

A. No, sir.

Q. You don't know what it was that they died of?

A. I know some of them died with Texas fever. I saw them sick and saw them dead afterwards.

Q. You saw them sick with something that you thought was Texas fever?

A. Yes, sir.

Q. And afterwards you saw them dead?

A. Yes, sir.

Q. How long after?

A. I saw them every day; I was around on the prairie every day.

Q. You commenced to make a critical examination of the herd?

A. I didn't make any examination; I just went to work and counted the dead ones and kept an account of them and wrote the ages of them.

148 Q. You commenced that on what day?

A. About the seventh or eighth of September—that is, taking down the description—but I had been watching, just counting them around, before that.

Q. Did you know at that time what the Texas fever was?

A. Yes, sir; I know as much as I do now.

Q. You never saw it for over twenty years before that?

A. No, sir.

Q. You never saw it but once before in your life?

A. I never saw it but once.

Q. That was in Kansas, and you thought these cattle got the same as those in Kansas?

A. Yes, sir; they had just the same.

Q. What did you say the symptoms were—the ears?

A. The ears will sort of droop; ears just lop, and froth a little at the mouth, and hair stands up like in cold weather, and the urine is a little bit bloody.

Q. The hair will stand up?

A. Yes, sir; sort of rise on them.

Q. Is the urine always bloody?

A. Yes, sir; when they are sick.

Q. You didn't notice the urine in all these cattle?

A. No, sir; I didn't notice the urine in all of them; I noticed just what I saw.

Q. I understood you to say that they had a tendency to fight.

A. Yes, sir; they will.

Q. When you are on horseback?

A. Yes, sir; afoot or in a wagon.

Q. Fight anything?

A. Yes, sir.

Q. Did any of them make any attempt to fight you?

A. Yes, sir.

Q. While you were on your horse ?

A. Yes, sir.

Q. Were these Texas cattle or native that had the Texas fever ?

A. Mostly natives.

149 Q. Any of the Texas had it ?

A. I think only two had it. Some of Judge Brush's had it that have been there three or four years.

Q. Some of your Texas had it ?

A. Only two.

Q. Only two out of fourteen or fifteen hundred ?

A. The Texas that died ; yes, sir.

Q. They were the only ones affected by it of the Texas ?

A. No, sir ; some of them sick, but not all of them died.

Q. You mean two died ?

A. Yes, sir.

Q. How many more of them had it ?

A. I don't know ; I didn't keep track of the sick ones.

Q. And how many Texas had it, a great many ?

A. Yes, sir ; had it later, when it was not hard with them.

Q. Later in the season ?

A. Yes, sir.

Q. I understood you to say you commenced to count them about the 8th of September.

A. Yes, sir ; to take description ; about a week or so before that ; just riding around myself.

Q. You first learned of this Texas fever about the 30th or 31st of August ?

A. Yes, sir.

Q. That is when you telegraphed Mr. Mullen ?

A. Yes, sir.

Q. And he telegraphed you ?

A. Yes, sir.

Q. Then you didn't keep any record of it for a week or so afterwards ?

A. I went every day a week afterwards and counted them myself.

Q. Did you commence right away to drive these cattle of Brush's back ?

A. Yes, sir.

Q. About the 30th of August ?

A. About 3rd or 4th of September.

Q. Were any employees of the Western Union Beef Company there ?

A. No, sir ; they were not.

Q. Do you know where their camp was at that time ?

150 A. Yes, sir ; one ranch was up there above Iliff.

Q. How far ?

A. About a mile and a half from Iliff.

Q. Had a home camp for a great many years there ?

A. Yes, sir ; they got a camp ; only kept one man only when the wagon comes around.

Q. That was their range on the south side of the river?

A. Yes.

Q. Had been ever since you were there?

A. Yes, sir.

Q. And they owned land along the river?

A. I don't know anything about the land, only what they got home in the pasture.

Q. Did you notify any of these people of the home ranch of this situation?

A. I did not.

Q. Didn't tell them anything about it?

A. There was but one man to notify there that I know of.

Q. How many of these cattle belonged to the Western Union Beef Company, or about how many were on the south side of the river when you first commenced to look around and drive them back?

A. I don't know. I didn't go over there myself.

Q. Don't know how many?

A. No, sir.

Q. It is a fact that the cattle there—your cattle—ranged on both sides of the river, and their cattle ranged on both sides of the river?

A. My cattle didn't go there much, if I could help it. I tried to keep them from there.

Q. They tried to keep theirs on their side of the river?

A. There is nobody to keep theirs back.

Q. Some ranged a little?

A. His always come over to my side when the river is dry. They have to come over to get water.

Q. Is it hard to keep them on one side of the river?

A. Yes, sir; in one place.

Q. You say you cannot keep them all on one side?

A. You cannot keep them all the time.

151 Q. They will cross from one side to the other? Some of yours were on their side?

A. I won't swear that any of ours was on their side at that time. To the best of my recollection, we threw all ours on our side. When they turned their cattle all of our cattle, to the best of my recollection, had been turned on the north side.

Q. You were getting ready for their cattle to come in?

A. Yes, sir. When their cattle are turned loose they travel day and night without stopping, and I didn't want mine to go with them.

Q. After taking them off the car they run about?

A. Yes, sir.

Q. Of course, it is only an understanding between cattlemen that they are entitled to a certain range. They don't own the land?

A. We own most of ours.

Q. Not back any way from the river?

A. The summer time along the river front, unless they go back to these springs for water—

Q. The summer time they feed back of the place?

A. No, sir ; not in the summer time ; feed on the place in the winter.

Q. The Western Union Beef Company and people interested with them had that range in there for a great many years before Mullen and McPhee came in ?

A. Nobody but Mr. Brush.

Q. It was his range for a great many years before anybody was with him ?

A. Iliff was there before they were.

Q. But Iliff and Brush outfit were there years before Mullen and McPhee came in there ?

A. That is, they always claimed—every man claims—a certain range.

Q. And had been there for many years ?

A. Along on the other side.

Q. Didn't they have some on the other side ?

A. When grass was scarce on Brush's side he used to turn them over to our side.

152 Q. Didn't they have a place known as the Hundred ranch ?

A. That was down at Julesburg, thirty-one miles below us.

Q. On the north side of the river ?

A. Yes, sir.

Q. Cattle range sometimes between twenty and thirty miles ?

A. Yes, sir ; but Judge Brush's cattle never ranged much up there. His cattle were always getting on the south side of the river.

Q. Whatever that may be, as a matter of fact cattle did range on both sides of the river ?

A. Yes, sir ; of course they would.

Q. You say the Hundred cattle were getting on the south side all the time ?

A. They were getting—the first Hundred ranch was on the north side of the river and they took and still kept them on the south side, when they put the cattle from Bushkirk ; the bulk of them was running on the south side of the river.

Q. Didn't they run on the north side ?

A. When they first started that brand——

Q. Didn't they keep them on the north side all the time all the winter ?

A. Not that I know.

Q. Isn't it a fact that they had ranges on both sides of the river and their cattle would run from one range to the other and from one ranch to the other—run both sides of the Platte river ?

A. No, sir.

Q. Up and down both below and above Iliff ?

A. Our cattle never went to the south side of the river much until lately.

Q. I am talking about the Union Beef Company. Didn't they range on both sides of the river ? Didn't they have ranges up and below Iliff ?

A. They never had but one that I know of ; that is the Hundred ranch ; they had none on the north side, except the Hundred.

- 153 Q. They had several on the south side ?
A. Only one that I know of.
Q. Do you know where the L. F. ranch is ?
A. Yes, sir.
Q. Where is that ?
A. There is one old one right below Iliff.
Q. Didn't they have that ?
A. Who ?
Q. The Western Union Beef Company.
A. Not that I ever know of did they have it.
Q. Then there was one close to Julesburg—the L. F. ranch ?
A. Yes, sir ; an old ranch.
Q. They had that for a while ?
A. Not that I know of.
Q. You didn't see yourself what became of these cattle after they were branded ?
A. I didn't see them until I saw them on our side of the river next day.
Q. Didn't you notice the other side of the river after ?
A. No, sir.
Q. Were you across that river ?
A. Not that trip.
Q. Weren't most of them over ?
A. No, sir ; only what I drove over.
Q. When did you drive any over first ?
A. I drove them all the time from about July.
Q. When did you first do it ?
A. I don't know ; some time in July.
Q. When ?
A. Along about the middle.
Q. What did you drive them over in the middle of July for ?
A. Because I didn't want his herd there to eat up what grass I had.
Q. You didn't want the grass eaten up on your range ?
A. Not all of it.
Q. How many did you drive over that day ?
A. Some day- we drove over five hundred, and some days less, and some days more.
Q. Would you say you drove three hundred ?
A. Yes, sir.
Q. Four hundred ?
A. Yes, sir ; between three and four hundred.
154 Q. Where were these when you first found them ?
A. Right there—right in front of the Powell ranch—Powell place.
Q. How far across the river ?
A. From a mile to two miles altogether from the river.
Q. Could you tell whether they just came across the river or been over there ?
A. I didn't examine them that way. I just rounded the cattle up and fetched them out and took them across the river.

Q. How many times from then until the last of August did you *drive* them back?

A. I don't know how many times. I used to drive them every day.

Q. They would come right back?

A. Yes, sir; right back at night.

Q. What was the condition of the river at that time?

A. Nothing in it hardly.

Q. Not much water?

A. No, sir.

Q. You say sometimes there would be a thousand of them come across?

A. Yes, sir.

Q. Ever drive more than a thousand?

A. In one drive that is a good day's work, round-up that many cattle.

Q. You think a thousand cattle came across that river?

A. Yes, sir; more to—

Q. In one day?

A. Day and night.

Q. Do you know whether Mr. Brush or the company had any other cattle on the south side of the river?

A. No, sir.

Q. These ranches?

A. Mr. Brush didn't have any other cattle, but some mixed up with ours that died.

Q. You kept his cattle?

A. His cattle he missed when he moved his cattle.

Q. When did he move them?

155 A. I told you I didn't know when; it was late in the winter.

Q. Do you know whether they were moved or not?

A. Yes, sir; because I saw them moved and a had a man to cut out what we wanted and bring them back.

Q. You were there when they were moved?

A. No, sir; I was at home.

Q. I understood you to say that you were away when they were moved?

A. Oh, I said if they were moved in the spring I might have been away. I said this morning I would not say positively whether they were moved early in the spring or late in the winter, and I saw when they were moved in the spring I was away, but I say I ain't positive.

Q. You say late in the winter. What winter do you mean?

A. Along the last of November or first of December.

Q. 1891?

A. Yes, sir; 1892. I say 1892. They were moved in 1892. I think they moved them also in 1891.

Q. He moved them in December, 1891, or December, 1892?

A. No, sir; I didn't say December. I say I think he—I won't be

positive—I know he moved them in 1892, either in the spring or winter.

Q. How many did he move?

A. I don't know; I didn't go over to see them.

Q. About how many?

A. I don't know. I have a man that has been working with Judge Brush almost all winter, and I left that to him, and I didn't pay any attention to it.

Q. There were several thousands?

A. I told you I didn't know. I didn't go over there.

Q. Don't know that there was?

A. No, sir.

Q. From your knowledge of the cattle business; what you saw?

A. No; if a man hadn't worked on the ranch he cannot tell.

Q. Would you say a thousand?

A. Yes, sir.

156 Q. Two thousand?

A. No, sir.

Q. Don't know that there were several thousands on that side?

A. I don't.

Q. You don't know whether it was December, 1891, or December, 1892, that you moved them?

A. I know it was December, 1892; either December, 1892, or the spring of 1891—I won't say which—or November or December.

Q. November or December?

A. Yes, sir; or the spring.

Q. That year?

A. Of '92 or '91.

Q. Do you know, as a matter of fact, that none of the cattle were moved away from that range by Mr. Brush until the fall of 1891?

A. No, sir; I don't.

Q. Or the spring of '92?

A. No, sir; they were moved away before that time.

Q. Isn't it a fact that the company generally moved their cattle every fall and bring them back there in the spring?

A. No, sir; they never moved them every fall. I know some winters they stayed right there all winter; then a few came back when they drove them up. A few, but not all the cattle, came back.

Q. Do you know where they were moved to?

A. I do.

Q. Where was that?

A. Either generally moved from what we call Buffalo slues up to Beaver creek; scattered them along the river.

Q. Where is that?

A. Above Sterling.

Q. Up the river?

A. Yes, sir.

Q. And you don't know how many cattle were there? You didn't work that side of the river?

A. No, sir.

Q. Do you know of a herd of a hundred and fifty grade cattle kept there?

A. Yes, sir; I know they were; home cattle, he called them. They were kept at home; I know that.

Q. You never saw Mr. Brush until the 4th or 5th of October?

A. No, sir; I don't think I saw him from the time I talked to him until then.

Q. When did you count these cattle?

157 A. I told you I commenced counting them from about the 6th to the 8th of September.

Q. You say these thoroughbred cattle were kept in pasture?

A. Generally kept at home; sometimes they fed them. They were not thoroughbred; just cattle the Judge had there.

Q. Kept in pasture?

A. In pasture right home there.

Q. They were mixed with these Texas cattle?

A. Yes, sir.

Q. The same as any others?

A. Yes, sir.

Q. You counted those cattle?

A. I say I commenced the 6th of September to the 8th of September. Then we counted them from that date on for a week or ten days.

Q. So you finished counting them by the last of September?

A. Yes.

Q. By, say, the 20th of September?

A. Yes, sir; somewhere along there; I won't be positive.

Q. And none died afterward?

A. Yes, sir; they died up till October.

Q. Did you keep track of all that died?

A. No, sir.

Q. Did you count them any more after that?

A. No, sir; a lot died away off that I didn't get. I found afterwards—after I made a report of which I didn't keep any count.

Q. You made affidavit as to the number you found and have it?

A. Yes, sir.

Q. Did that include all that you know of up to that time?

A. All that I knew and counted and taken description of.

Q. And all that you had been able to find up to February?

A. No, sir; I seen a great many more, because I never took a description.

Q. All that you were able to identify?

A. Some that I didn't have after that.

158 Q. Why is it at that time that you were only able to swear to finding thirty-three head?

A. I swore to one hundred and sixteen head, my affidavit states.

Q. Isn't it a fact that you only swore to thirty-three head and Mr. Powell swore to eighty-three head?

A. We were both together; I didn't keep the list. I got down and examined the brands of cattle and ages and Mr. Powell and

Mr. Greenman got them, and I was there and saw him put them down.

Q. Isn't this the affidavit that you made: Sterling, Colorado, February 16th, 1892. To whom it may concern: This is to certify that the following cattle, owned by McPhee & Mullen, were found dead by me of Texas fever; then bulls and a list of steers, thirty-three; signed by yourself and sworn to; that is the affidavit?

A. Yes, sir; but Powell swore to other ones.

Q. If you had found one hundred and twenty head at that time and the matter was fresh in your recollection, why didn't you include that in your list?

A. I handed it to the attorney.

Q. What attorney was it?

A. Mr. Burke.

Q. You told him that you had found thirty-three head?

A. I told him we found hundred and sixteen. He read the affidavit out the way I got it.

Q. If you told him—you were not interested in making the claim any smaller than it is now?

A. I swore to that one and Mr. Powell swore to the other.

Q. You were only willing at that time to swear that you found thirty-three head?

A. I swore to hundred and sixteen; that is all he required. He said that is all he required; that Powell had the other ones in his book.

Q. What did you tell him about those thirty-three head?

A. I don't know.

Q. You gave him the facts?

159 A. I just told him what we had seen, and we had seen hundred and sixteen head.

Q. Were you and Mr. Powell together all the time?

A. Yes, sir; may have been some time half a day or two or three hours we would not be right together. We were near together at every animal that was put down.

Q. Close together?

A. Yes, sir.

Q. Was Mr. S. A. Burke the gentleman that you told about this?

A. Yes, sir; he was the attorney that fixed it up.

Q. You both swore to these affidavits the same day?

A. Yes, sir.

Q. Do you know how you came to divide it up, that you only found thirty-three head and Mr. Powell eighty-three?

A. Yes, sir.

Q. How was it?

A. Because that thirty-three was on another book after Mr. Powell quit us, and the eighty-three was on Mr. Powell's books.

Q. They were both together?

A. We were together up to the eighty-three, and Mr. Powell quit it, and Mr. Greenman was with me, and we took the thirty-three. That is how I came to swear to this and Powell the other.

Q. This footed up hundred and sixteen head?

A. Yes, sir.

Q. When did you find the other four you told us about?

A. Long afterwards, I found them right below the ranch.

Q. That was after February?

A. No, sir; there was nothing found after February.

Q. Why didn't you make it one hundred and twenty head, then?

A. Because I didn't have the book they were in with me.

Q. You could not have made the affidavit justly?

A. Yes, sir; but I could not swear to the ages and everything of these four.

Q. Isn't it a fact that about the same time or some time that fall, in conversations with Mr. Brush, you told him thirty-three was all that you found?

160 A. No, sir; I never saw Mr. Brush from the time I talked to him at Iliff until I talked to him in Sterling. He met me on the train in October, about the 4th or 5th.

Q. You haven't them all in?

A. Yes, sir.

Q. You never told him, then, all you saw was thirty-three?

A. No, sir.

Q. How much were these bulls worth?

A. Forty dollars.

Q. Did you put any value on these cattle in February?

A. No, sir; not myself.

Q. Were they all worth forty dollars—the cattle, the bulls?

A. Yes, sir.

Q. Why was it they were only valued at thirty-five dollars in February, 1892?

A. Because they were dead, I reckon.

Q. Does that make any difference in value?

A. Yes, sir.

Q. When this bill was put in on the 16th of February they didn't value them at thirty-five dollars because they were dead, then?

A. No, sir.

Q. Not on the basis of being dead?

A. Some one sold two bulls around the neighborhood there at forty dollars.

Q. You didn't put them in any smaller in price than they were actually worth, did you?

A. No, sir; I don't know as I remember that.

Q. Wasn't this list all made out by you and Burke on the 10th of February?

A. Yes, sir.

Q. And the values put down?

A. I don't know as I valued them.

Q. And you put the bulls at thirty-five dollars each?

A. I cannot say that I did.

Q. And these steers you got from thirty to thirty-five dollars?

A. Yes, sir.

Q. Why was it at that time you put five steers in at seventeen dollars each?

A. I don't know.

161 Q. Four of them at twenty-five dollars each, one at twelve, two at twelve, three more at twelve, and three others at twenty-five. The highest valuation that you put on a steer was thirty dollars, and the bulk of them at twelve to seventeen dollars. Do you know why you put these figures on them at that time?

A. I don't know as I put them there.

Q. Didn't you testify so; that you made out this list for Mr. Burke?

A. I don't know as I put the values on anything.

Q. Didn't you take them from your book?

A. Yes, sir; but I never had the values on my book.

Q. Never put them down. You better knew the value at that time, didn't you, than you do now—more familiar with those particular cattle?

A. I know they were worth more money at that time.

Q. You don't know how you happened to put them at such a small price?

A. I don't know as I did do it.

Q. Didn't you render this bill and make these affidavits on the 16th of February at Sterling before Mr. Burke?

A. I made only one, but I say I might have sworn to—I don't remember that valuation. I didn't put that valuation to it.

Q. You don't know who put it on?

A. No, sir.

Q. Isn't it on the list you had this morning?

A. I don't know.

Q. Have you got that list with you? (Witness refers to list.)

Q. No, sir; if you can find it there you can beat me.

Q. That is a list you gave Mr. Brush?

A. Yes, sir.

Q. Wasn't there another paper went with it?

A. No, sir.

Q. What is that paper?

A. That is a different paper of mine. There is your list of the number of cattle you got right there.

Q. Yes, sir; this is the list and two affidavits. Isn't that the other list you got right there?

A. No, sir; that other list hasn't got anything to do with it.

162 Q. It was made at the same time as this?

A. No, sir; my affidavit there and Mr. Powell's is all I swore to.

Q. Isn't it a fact that that list that you have got in your pocket—a copy of that other page?

A. It may be all that, but I don't swear to that. That may be a report of what they did at the meeting.

Q. Wasn't this made out at the same time?

A. It is the same thing. That is a copy of what we made out and printed and put in the book.

Q. That is, you swore to that?

A. Yes, sir.

Q. But the other paper you didn't?

A. No, sir; because it may have been the same handwriting.

Q. Is that a copy of this?

A. No, sir. It might be, but this was made out at their meeting. This is all I swore to in effect.

Q. What was that made out for?

A. I don't know. I never saw it until today.

Q. Hasn't it been with these two sheets all the time?

A. No, sir.

Q. Never was?

A. Not that I know of.

Q. Don't you know they were all three made out there in Sterling at the same time, made out by you, and values given?

A. No, sir; I don't know about its being made out by Burke for me. I swore to this paper, and this other one I didn't.

Q. Take the other paper you got there. Don't that show Sterling, Colorado, February 16th, 1892, Western Union Beef and Land Company to McPhee and Mullen, five bulls, \$35, \$175? Is that the thing there?

A. Yes, sir.

Q. Fifty-nine cows, \$20, \$1,180?

A. Yes, sir.

Q. Five steers, \$17.00, two-year-old, \$85?

A. That may be, but that is not in my affidavit. Here is my affidavit.

163 Q. I am not talking about that.

A. I don't know anything about that paper being made.

Q. You never saw that until today?

A. No, sir; not that I know of.

Q. Four steers, \$25.00—isn't that on there—three-year-old?

A. I don't see it.

Q. Isn't it the fourth item, 4 steers, \$25.00, three-year-old, \$100?

A. See four steers here, \$30.00, ninety dollars.

Q. That is the next item; just above that; the one right above.

A. Yes, sir; I see one hundred dollars.

Q. Three steers, \$30, \$90.00, four-year-old?

A. Five steers, three steers.

Q. Five steers, then four steers, and then three steers; runs on down; total, one hundred and sixteen; total valuation, \$2,388. Is that right?

A. That is what this paper says.

Q. You say you never saw that paper before?

A. I say, to the best of my recollection, I don't know anything about that paper. That is the paper I swore to.

Q. Where did you get all three of those papers that you had there in that bundle?

A. I got these—this is what I swore to and signed and sent to Mr. Mullen.

Q. Where did you get them?

A. At Mullen's office this morning.

Q. Did you send them to him ?

A. I sent him these two. I don't know about signing that one ; I might have signed it and two others. I recollect I only sent him two, but Mr. Burke sent them.

Q. How did you come to make these two affidavits you have sworn you swore to ? How did you come to make the affidavit ?

A. I made it out to send up here.

Q. Who went with you to make it out ?

A. Mr. Powell.

164 Q. Where did you go ?

A. Mr. Burke.

Q. Who else was there ?

A. I don't know that there was anybody.

Q. Just you and Mr. Powell and Mr. Burke ?

A. To the best of my recollection ; there may have been more in Burke's office.

Q. That was on the 16th of February, 1892 ?

A. Yes, sir.

Q. And at Sterling ?

A. Yes, sir.

Q. See Mullen there ?

A. No, sir.

Q. McPhee ?

A. No, sir.

Q. Anybody representing the Western Union Beef Company ?

A. No, sir.

Q. Who wrote these two affidavits out ?

A. I think Mr. Burke.

Q. In his handwriting ?

A. I think so.

Q. Can you tell us—can you give us any idea of how he came to write it at the same time with the other paper ?

A. I didn't say that he wrote it. I don't say whether this is or if this is (indicating different papers).

Q. Isn't it the same handwriting and same kind of paper that the other two are ?

A. It looks that way.

Q. So, then, if you or Mr. Powell didn't tell him to put it down he just put it down on his own motion and signed it ?

A. I don't know anything about it.

Q. At any rate, you never saw it until today ?

A. No, sir ; I don't recollect ever seeing that paper before today ; no sir.

Q. Did you take your books in there that day ?

A. Yes, sir.

Q. You didn't say anything about calves at that time ?

A. No, sir.

Q. Did you find any dead calves ?

A. Might have been a few little ones ; lots of them starving to death.

Q. How do you know unless you saw them ?

A. I say I saw them starving to death on the prairie.

Q. Do you know whether they did actually starve to death?

165 A. I know they died.

Q. How do you know?

A. I saw them afterwards.

Q. When did you see the calves?

A. I cannot tell you the day; we were working around there all the time.

Q. Never kept no book account of them?

A. No, sir; lots of them were not branded.

Q. You didn't pay any attention to the calves?

A. No, sir.

Q. Worth seven or eight dollars a head?

A. No, sir; I didn't pay a bit of attention.

Q. They didn't count?

A. No, sir; because we could not have taken all the calves; all of them were not branded. We know the cows died. We could not tell where a little calf was not branded, but we could see where a cow was dead and had lost a calf.

Q. There were eighty-five cows that died out of this hundred and sixteen—hundred and fourteen you had this morning?

A. One hundred and sixteen to one hundred and twenty I had this morning.

Q. That is, you afterwards told us there was twenty-three steers, eighty-five cows, and six bulls?

A. Yes, sir.

Q. That makes 114?

A. 116.

Q. How many of these cows had calves?

A. Eighty-seven cows, six bulls, 21 American steers, and two Texas steers, makes 116.

Q. There are eighty-seven cows. Do you think forty or fifty of these had calves?

A. Yes, sir; I know it.

Q. Did you count them?

A. I noticed the calves when I was looking at them that had lost the calves. I could tell whether the cow lost a calf, and could see the calf standing around there—around the cow.

Q. How did you figure out the number of calves that died?

166 A. I just figured it what I saved and what died from the number of cows that lost them.

Q. How many calves did you save?

A. About eighteen or nineteen—that is, the children did.

Q. You saved eighteen or nineteen?

A. Yes, sir; out of about forty-five cows.

Q. Both these figures are sort of guesswork?

A. No, sir; they are not.

Q. You didn't keep any record?

A. I kept a record of what I saved, and I know about forty-five that lost calves. I kept them right in the pen or corral all winter,

from the time I come there, and until spring, and some are in the pasture yet and never have been out of it.

Q. These cattle died about the first of September?

A. Some of them died before that time, away in August, some in July.

Q. Some died how early in July?

A. I learned down there—I didn't see them myself—I heard some of them died about the 15th or 16th of July.

Q. Some of these cows that had calves?

A. No, sir; I said some cattle died.

Q. They were all spring calves?

A. Yes, sir; spring and summer calves; some along in June, July, and August.

Q. And they were all too small to eat grass?

A. Yes, sir.

Q. The first of September?

A. The cows died before the first of September; the cows commenced dying the first of August.

Q. You didn't know, then, anything about it until the last of August?

A. Yes, sir; I noticed the cattle dead about the middle of August, but I told you I didn't look—

Q. That is the way you get at the number of these calves?

A. By seeing the cows?

Q. Yes, sir.

A. Yes, sir; that is a good way to get at it—to see the mother of the calf.

167 Q. And you say they were worth how much?

A. Six to seven dollars a head.

Q. What did you get for the calves you shipped that fall to market?

A. I don't exactly know. I think it was from a dollar seventy, \$1.85 to \$1.90.

Q. How much would that be a head?

A. According to what they weigh.

Q. About how much—what did they weigh then?

A. They will weigh nine hundred or ten.

Q. Didn't you tell us a while ago that it was \$12 to \$14 a head for the cows?

A. I say they were worth \$15 a head; I repeat that.

Q. The cows you shipped that fall you got \$14 to \$15 a head?

A. I didn't say that.

Q. What did you get for them?

A. You asked me what cows were worth. I said from \$14 to \$15, what we paid for the cows. We got from \$15 to \$18 for cows.

Q. That is, the cows ready for market?

A. Yes, sir.

Q. You say some of the people there that had cattle in pasture didn't loose any. Do you know that of your own knowledge?

A. Yes, sir.

Q. See them?

A. I do know it of my own knowledge; saw the cattle; see them every day.

Q. Where did you move the cattle to?

A. I moved mine just to—just a little below our pastures, and then I moved Mr. Brush's west on our land there. There had been a host of it to do since April, and I moved my cattle right down.

Q. You got a thirty-five-hundred-acre pasture there?

A. Yes, sir; we got lots of land; got a big lot of land in there.

Q. You didn't move them off your range?

A. I didn't; no, sir; I didn't move them off of my own range.

168 Q. In fact, all you did was to herd them—get them back and herd them?

A. No, sir; got them away from Judge Brush's cattle.

Q. Did you hire any extra men for the work?

A. No, sir.

Q. Just kept the usual ranch outfit?

A. Yes, sir.

Q. So when you say it cost \$250 or \$300 to move them—

A. I had men to keep Judge Brush's cattle out.

Q. The men had all been working on the ranch?

A. Yes, sir; but they could have been at a different thing.

Q. What could they have been doing?

A. Haying.

Q. Did you cut all your hay?

A. No, sir; I had to contract it—hire it done.

Q. It must have been overlooked some way?

A. No, sir; it was not.

Q. You don't include the hay? At any rate, you didn't hire any extra men or pay out any extra money for moving these cattle?

A. No, sir.

Q. Just the usual ranch outfit?

A. Just my usual round-up outfit.

Q. It took you four days to move them?

A. Yes, sir.

Q. Is that worth two hundred dollars?

A. I didn't say just to move them. I said to move them and keep Brush's cattle out of there.

Q. What was the actual cost of moving?

A. I don't know; I never figured it up.

Q. How did you figure it up—how much of it?

A. I know what it cost me a month, and we were working from September until October until we got Mr. Brush's cattle moved out of there.

Q. You put in two months' time?

A. No, sir; I say from September. In August we were making hay before we knew about it; I say until the first of October.

Q. You put in one month?

A. Yes, sir.

Q. You say one month's time. About what did it cost you?

A. I kept his cattle away and ours away from his; kept his cattle away from ours.

169 Q. The bulk of that was keeping his cattle away?

A. You can take it in any way you want to.

Q. I wish you would explain how you were prevented from shipping any cattle by reason of this Texas fever.

A. Well, I know the Texas fever, and I know there is a quarantine in Nebraska against it.

Q. You only thought it.

A. If I put my cattle in a car and ship them with one or two dead ones we would have lost the whole thing at Omaha.

Q. You thought it.

A. I know it is so.

Q. You know there is a quarantine in Nebraska?

A. I know there is a quarantine in Nebraska.

Q. What kind of quarantine against cattle?

A. Against Texas fever.

Q. Against cattle coming from Nebraska?

A. No, sir.

Q. Don't you know that cattle that take Texas fever—native cattle that take it—cannot give it to other cattle?

A. Yes, sir; I do, and I know they can die.

Q. You say they would have been confiscated. All they would have done would be to throw out the dead cattle.

A. Take a load of sick cattle, wouldn't they throw them out?

Q. What are these rules and regulations?

A. Confiscated them; turn them loose or kill them, and get nothing, and been sued for damages.

Q. What rules do you know about?

A. I just know that is a regular law; whenever there is a cattle fever they cannot ship them.

Q. You simply knew that?

A. Yes, sir.

Q. Did you consult anybody about it?

A. I did; the first of October.

Q. The cattle were ready to ship then?

170 A. But they didn't get shipped; the Texas fever was still there.

Q. When did you make your next shipment after the 28th of July?

A. I think it was the last days of October or first days of November.

Q. Are you positive about that?

A. Yes, sir.

Q. When did you have your frost that year?

A. About the first of November.

Q. Wasn't there a heavy frost there in September?

A. No, sir; there was not.

Q. Didn't you testify this morning that it rained all that season, and that you had a heavy frost?

A. No, sir. This morning I testified that the rain and frost

would keep the disease off, and I testified that the frost would kill it.

Q. Didn't you testify this morning that it rained heavy all that season and you had an early frost?

A. No, sir; I didn't.

Q. Was there an early frost?

A. No, sir; there was no frost until late.

Q. Until the first of November?

A. Along about the first of November a killing frost.

Q. Don't you know as a matter of fact that there was a frost that year along about the middle of September?

A. No, sir; I didn't know it, and I don't know it yet.

Q. Didn't the Western Union Beef Company ship cattle all that summer?

A. Shipped them from Brush, but not from down there.

A. None from Iliff?

A. No, sir.

Q. Or in that neighborhood?

A. No, sir; had none there to ship.

Q. You say they shipped from Brush?

A. Yes, sir.

Q. How far is that?

A. About sixty miles.

Q. Up the river?

A. Yes, sir.

Q. That is the nearest point they shipped from?

A. They shipped all up and down the road on the B. & M.

171 Q. You were not prohibited by any authority from shipping?

A. Yes, sir. I was only advised by the Government inspector not to ship.

Q. What Government inspector?

A. Mr. Jordan.

Q. Who is he?

A. He is the United States Government inspector.

Q. When was he there?

A. He was there from about the first until the 5th of October.

Q. What did he tell you?

A. He advised me not to ship them.

Q. Advised you not to?

A. Yes, sir.

Q. Order you not to?

A. I don't know what you call it. He said, "You had better not ship them; you will get into trouble."

Q. He told you that?

A. Yes, sir.

Q. Was there any of the authorities in Nebraska gave you any warning or notice?

A. No, sir.

Q. Or any of the State authorities?

A. No, sir.

Q. Could you tell when one of these steers had the Texas fever?

A. Yes, sir.

Q. How many of these four or five hundred head had it?

A. I don't know.

Q. Isn't it a fact about the Texas fever that the native cow or native steer that has it cannot give it to another native?

A. Of course it cannot. I say our native cattle won't give it to ours.

Q. If they got it?

A. No, sir; they won't do it.

Q. After you got them separate—when did you say you separated them, the middle of September?

A. Yes, sir.

Q. After you got them separated, then it was easy enough to pick out the sick ones?

A. I don't know; I never tried.

Q. You could tell them when you saw them?

A. Yes, sir.

Q. You could ship all the well ones, couldn't you, after that?

A. I don't know; they may look well today and be sick tomorrow. You can't tell about that.

Q. After you got them separated—the middle of September—and got them separat- for a week or two, what was there to prevent you from shipping the well ones?

A. Because I didn't know when they were well.

Q. Then you could not tell the difference between a sick and well one?

A. I could not tell the jury; you could not tell when *when* a well one *was* going to get sick.

Q. Without you could get them separated?

A. Yes, sir; they didn't die in a minute. They may take the disease in twenty-four hours, and perhaps not die for three or four days.

Q. After you got them separated away from the Brush cattle—kept them away, and you kept them in this pasture—you could readily pick out the well ones?

A. I could along in October or November.

Q. Couldn't you in the middle of September? Couldn't you in the last of September?

A. No, sir.

Q. What was there to give them Texas fever?

A. Some was afflicted with it when I moved them.

Q. You could tell then?

A. I could tell at that time, but I didn't know how many more might have been.

Q. How many of that outfit were there of the shipping cattle that were sick at that time?

A. I didn't go to examine every one; in fact, there was several. I didn't go to examine hardly.

Q. Isn't it a fact that in Texas fever cases the fat, healthy cattle don't take it as readily as the poor ones?

A. No, sir; it is not. It is just the other way with ours. The poor ones don't take it; they don't take it so readily. The fat cattle take it the first.

Q. Don't cows with calves take it quicker than others?

A. With calves, I don't know as they do.

Q. Calves don't take it either?

173 A. I don't know whether calves take it. I never saw any calves die with it.

Q. The younger the animal is the less liable it is to take it?

A. I don't know as to that.

Q. What I want to get at is, what proportion would you say of these five or six hundred cattle that you had ready for market had Texas fever?

A. I cannot tell you a thing about it. I told you I didn't go and examine every animal. I know a good many had it. I didn't go and examine it, because we were hard at work, and five or six hundred cattle in a string we would not take—

Q. Did you keep the beef cattle from the other cattle?

A. No, sir; not until we put them in their pasture for the winter.

Q. When did you separate them?

A. The first of October of this year; and some years different times. I ain't separated them yet.

Q. That year, when did you separate them?

A. I didn't separate them at all; we had no use for it; we had all our pasture eat out.

Q. You didn't have the pasture eaten out in the middle of September?

Q. What is the use of separating them when sick?

Q. Did you have any means of knowing what proportion of these beef cattle had Texas fever?

A. No; I didn't go and examine them.

Q. If they didn't have the Texas fever they didn't lose anything in weight?

A. Yes, sir.

Objection by plaintiff to this line of examination as incompetent and immaterial.

Q. Didn't you attempt to make any account whatever of the number that had the fever?

A. That just had it?

Q. Yes, sir.

174 A. No, sir; I told you before I couldn't tell you just how many had it, because they were all scattered upon the pasture and prairie, and I didn't ride and look at every animal; it would take a man a long time.

Q. You couldn't tell whether half of them had it or a quarter or a third?

A. I stated to you I didn't go and examine each animal.

Q. Would you give us some estimate?

A. No, sir.

Q. Can't you give us any estimate whatever?

A. No, sir. I just saw a good many driving along, but I didn't go through all the herd.

Q. Out of three thousand head, according to your recollection now, there was only one hundred and twenty that you are able to identify as having died?

A. Yes, sir.

Q. You shipped your cattle about the first of November?

A. I say the last days of October or the first day of November; I won't be positive which. I know it was about the last or first of October or first of November.

Q. How rapidly did you ship; make it all in two or three shipments?

A. Made it all in two or three shipments.

Q. Got through in November?

A. Yes, sir—no, sir; I got one shipment the last week of December, I think it was.

Q. Can you tell us how many cattle you shipped in November and December of that year?

A. No, sir. I could tell you how many I shipped during the year.

Q. Can't you tell us how many you shipped there during this season?

A. No, sir; I don't recollect how many I shipped before that. I could tell you if I was at home.

Q. You said you shipped something like four hundred steers after the frost?

A. Yes, sir.

Q. How many of these were Texas steers?

A. About a third.

Q. What did you get for the Texas steers?

175 A. I don't recollect; I haven't got an account of the sales here. I think it was not over \$2.30 or \$2.25 or \$2.70. The same class of steers ought to have brought \$3 or \$3.35; they were running around all summer and knocked the flesh off.

Q. How many cows were there?

A. I shipped three hundred cows during the year. I don't know how many were in the first shipment.

Q. Three hundred?

A. Yes, sir.

Q. When you say the year you mean from spring to fall?

A. Yes, sir; I mean the shipping season.

Q. Your first shipment was the 25th of June?

A. Loaded on the 22nd and sold on the 25th.

Q. And your first shipment was the biggest and best cattle you had?

A. No, sir; just some native steers that had been around at home.

Q. Weren't they the largest and fattest in the bunch?

A. No, sir. I could have shipped more steers, but I only shipped

two cars. I could have shipped ten cars, just the same class of steers, right then.

Q. You shipped fifty then?

A. Yes, sir; that is all I was ordered to ship.

Q. Ship another lot in July—28th of July?

A. Yes, sir.

Q. And another about the first of August?

A. Yes, sir; and I got more money for the July shipment than I did for the June.

Q. You didn't ship any more till October?

A. No, sir.

Q. There was nothing to prevent you from shipping from the first of August until the last of August?

A. Yes, sir. The Texas fever was there.

Q. You didn't know anything about that until the 30th of August?

A. The Texas fever—all cattlemen has to take time, a little time—

Q. You wouldn't have shipped any during that time?

176 A. If Mr. Mullen had ordered it. I don't know what his intention is.

Q. You don't ship unless you get orders from him?

A. I get all my orders from him.

Q. When you report the condition of the cattle he tells you to ship?

A. When he says ship I ship. I don't do anything until he orders it.

Q. Did you get any orders to ship in August?

A. I don't recollect that I did.

Q. Up to the 30th of August?

A. I don't think I did, because probably I was making hay at the time; I know I was making hay at the time.

Q. You were prevented in shipping, in your judgment, from about the first of September until the first of November?

A. Yes, sir.

Q. Sixty days, and if it had not been for the Texas fever you would have been shipping all this time?

A. I would have been shipping out before that time.

Q. And sending to market every day?

A. No, sir; every week; once a week.

Q. You say you testified that you didn't testify this morning that you had an early frost that year?

A. No, sir; I didn't.

Q. The stenographer has it. I wish he would refer to that part of his testimony. What do you call an early frost?

A. November and October—November; hardly have it until that time. We always count on an early frost *frost* from middle of October until November.

Q. You call an early frost the middle of October up?

A. Yes, sir.

Q. An ordinary frost comes when?

A. What do you call ordinary ?

Q. When does the ordinary come ?

A. November ; I have seen it the last of November before the frost came.

177 Redirect examination :

Q. About the removal of these cattle. You say you moved them in 1892 at one time ?

A. I was mistaken ; it was the fall of 1890 and 1891 ; either late in the winter or early spring in 1891 ; but they also moved them again in '92, but that is the first year. I was mistaken there ; it was the fall of 1890 ; either December—November or December in 1890. I remember—April or May, 1891 ; they moved their cattle to what we call the bottom of Buffalo slues.

Q. And that was before the cattle was shipped in ?

A. That was before their cattle was shipped in.

Q. You stated about being prohibited by a Government official from shipping these cattle or warned not to ship them. Is that gentleman here in court ?

A. Yes, sir.

Q. Was he an United States official ?

A. Yes, sir.

Q. What is his name ?

A. Jordan.

Q. Where is he from ?

A. He is from Texas.

Q. What did he say to you ?

A. I was talking to him about shipping. He just advised me ; he says, "I wouldn't ship your cattle ; you might get into trouble. The cattle might arrive there and be sick and some dead ones and all the cattle be confiscated and sued for damages."

Q. Where was that ?

A. Down at my place.

Q. When was that ?

A. It was there, either between the 2nd or first and 5th of October. I don't recollect what date Mr. Jordan got there, but I think we left there and got to Sterling on the 5th.

Q. Was there a surgeon there—veterinary surgeon—cattle surgeon there about the same time ?

A. No, sir ; I didn't see him at that time ; I didn't see Mr. Lamb at that time ; I saw him afterwards.

178 Q. When did you see him ?

A. I think it was—I won't be positive whether it was that fall ; I think it was that fall he come down there.

Q. What position, official position, if any, did he hold ?

A. I know he was a veterinary surgeon. I had seen him before.

Q. Was he representing the State of Colorado ?

A. Yes, sir.

Q. Was he down there in his official capacity ?

A. Yes, sir.

Q. What did he say about this ?

Objection by defendants, as no authority shown.

Q. Do you know that he was a veterinary surgeon, Mr. Lamb?

A. I know just what he told me, and that is what I see in the papers.

Q. And he was acting in that capacity?

A. Yes, sir.

Q. What did he say with reference to this disease?

Objection by defendant as hearsay.

Question withdrawn.

— Mr. Matthews, with reference to these men and their expenses moving your cattle to get them out of the range of this disease, if you hadn't had these men engaged in that business, wouldn't they have been engaged in some other business, cutting hay or something?

Objection by defendant as incompetent. Objection overruled.

The COURT: If they had to take them away from something else and put them on this work that is proper.

Q. They would have been in the hay field and were in the hay field at the time.

Q. And I understand you to say that you didn't do all the cutting of your hay that year?

A. No, sir.

Q. Was that for the want of sufficient force?

Objection by defendant as incompetent and immaterial.

Objection sustained; to which ruling of the court the plaintiffs duly excepted.

179 Q. With reference to these calves, what became of the calves that survived the mothers, all of them didn't die?

A. One of my little boys wrote to Mr. Mullen and asked him—

Q. I only ask you what became of them in a general way.

A. Mr. Mullen gave to my children what they could save.

Q. Do you know whether the wolves got any of them or not?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. I will ask you whether the round-up commences down there about the first of August or somewhere along that time.

A. The round-up—we generally started from home about the 18th of August on the round-up.

Q. Do you know what day the round-up was?

A. We left home on the 18th for the round-up.

Q. Does the round-up take all the available force you have there?

A. Yes, sir; all but one man.

Q. How long does the round-up last?

A. From a month to month and a half.

Q. And you say you started about the 18th of August?

A. Yes, sir.

Recross-examination :

Q. The round-up on the 18th of August?

A. Yes, sir; what we call the beef round-up; we generally left home the 10th.

Q. You don't mean to say that it took eight men a whole month to keep some steers or the cattle of Mr. Brush away from yours?

Q. I say that we kept them away and kept them away before we ever started to move them.

Q. You moved them in about four days?

A. Yes, sir; we had been at work a long time, and after that we had to keep working at them. The next day after we had
180 taken them away from there we had to drive them out; they travel like reindeer.

JUROR: That Powell place you say that you cut your beef cattle out and put them in the Powell place, was that fenced?

A. Yes, sir; we had a pasture at that time—a big pasture right here—and we cut them out and put them in there. While I am at work in this end of the ranch, when I get ready to go there, we put them from the pasture home into that pasture ready to ship.

Q. That had a wire fence all around?

A. Yes, sir; a three-wire fence.

Q. You testified that a wire fence will keep the Texas fever out?

A. Yes, sir; I had it right there at home.

WILLIAM E. JORDAN, a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct examination :

Q. Where do you reside?

A. Quanah, Texas.

Q. How long have you lived in Texas?

A. Since April, 1891.

Q. Have you been engaged in the cattle business to any extent?

A. Yes, sir; since '77.

Q. Continuously since '77?

A. Yes, sir.

Q. Seventeen years?

A. Yes, sir.

Q. Whereabouts, in what State and Territory?

A. In the Indian Territory, Missouri, and Texas.

Q. What part of the seventeen years were you in the Indian Territory?

A. I was in the Territory from '77 until '87.

Q. Where were you after that?

A. I was in St. Louis as brand inspector for the Cherokee strip
in '87, '88, and '89.

Q. That is, inspector?

A. Of brands for the Cherokee Live Stock Association.

Q. You mean cattle?

A. Yes, sir.

181 Q. So that you have been continuously connected with cattle and the cattle business for the last seventeen years?

A. Yes, sir.

Q. State what, if any, position you held in the year 1891 in connection with the cattle industry of the country.

A. I was inspector for the Animal Bureau of the Agricultural Department in Washington.

Q. Whatever authority you had you had from the Government of the United States and that department?

A. Yes, sir.

Q. State what your duties were in that connection.

A. I was sent to Texas in April, 1891; the Government ran a quarantine line through the State of Texas and my duty was to see that no cattle was shipped from below that line to the Northern States or moved from east or south Texas to the panhandle of Texas.

Q. Then they were prohibited under these quarantine regulations from even transferring them from some part of Texas to some other parts of the same State?

A. Yes, sir.

Q. Would you be able, Mr. Jordan, to—that map is not marked—would you be able to run a line?

A. Yes, sir.

Q. You are practically familiar with these lines?

A. Yes, sir; I have been in every county in west Texas.

Q. Who ran these quarantine lines; by what authority were they run?

A. The Secretary of Agriculture made the line.

Q. What county is Quanah in?

A. Quanah is in Hardman county.

Q. Do you know well the locality of Kimble county?

A. Yes, sir.

Q. Is all that part of Texas a cattle country?

A. West Texas and south Texas is all cattle country; there is cattle grazing all over the State, but the ranches are in south and west Texas.

Q. Point out Kimble county on the map.

A. (Witness does so.)

182 Q. In reference to the south and southwest, what part of the State is Kimble county in?

A. It is in the southwest part of the State.

Q. By these quarantine lines you mean that cattle could not be transported across these lines. You mean in going from north to south and from south to north or in either or both directions?

A. One is through west and north Texas and they can go anywhere, but I never heard of a man driving them there himself.

Q. The prohibition was from driving south across that line?

A. Driving them across to north.

Q. I mean from the south to the north?

A. Yes, sir.

Q. They were prohibited from driving south across that line south or north?

A. Here was the line down to the one hundredth meridian.

Objection by defendant to any testimony in regard to any quarantine lines or regulations and rules, for the reason that Congress had no authority to pass such laws and that act did not authorize the quarantine regulations as they were enacted. Objection overruled.

The COURT: The question Mr. Bryant raises is that Congress had no power to enact such legislation. If it comes under head of interstate commerce, I have no doubt they had that right.

Q. Proceed with the description of the line.

A. The line in '91 ran across the south line of Kansas to the one hundredth meridian.

Q. Give the line that ran, in February, 1891, and then the line as run in April, 1892.

A. Then, in February, it was made to run down the one hundredth meridian, around down the east line of Hardeman county,

183 Wheeler, down the east line of Cottle and King. When it got to King it turned west and ran along the south line of Dickens, Crosby, Lubbock, Hockley, and Cochran, down to the corner of New Mexico, then over to the Pecos river.

Q. Then, according to that line, was this county of Kimble within the prohibited territory?

A. Kimble was on the outside. Kimble county was not allowed that year or no year since ever allowed in the panhandle of Texas.

Q. In April was the line changed?

A. The line was changed so that they could ship cattle through from Kimble county and these counties down there to Colorado and Montana, provided Colorado and Montana would keep these cattle separate from other cattle.

The COURT: You mean the line was changed from south of Kimble county?

A. No, sir; it was north, away north of Kimble county. It was 150 or '75 miles north of the line.

The COURT: Then it was moved south?

A. Yes, sir; to let these cattle come to Colorado and Montana.

Q. As the line stood under the February rules, cattle from Kimble county were prohibited?

A. Yes, sir.

Q. From being driven north?

A. Yes, sir.

Q. Under the line as established in April of the same year, that line was run so that Kimble county was no longer in the prohibited territory, provided they complied with the rules of the Interior Department?

A. They could come to Colorado and Montana and no other States would allow them in, nor were they allowed in Panhandle, Texas, except shipment to market or immediate slaughter.

Q. After the line was changed or before, did you exercise any au-

184 thority there under the rules and regulations of the agricultural district or department as to what terms and conditions they could be brought into Colorado?

A. I went there just about the time the change was made. I went there the 20th, and the rule was changed the 23rd. I didn't hear of it for probably ten days or two weeks that I was off a railroad. I was down on the old trail, and I was not near a railroad.

Q. After that time, subsequent to that time you have operated under these rules, haven't you?

A. Yes, sir.

Q. In doing that operating, after the rule was changed in connection with the cattle industry, did you aim to enforce the rules and regulations as given by the Bureau of Animal Industry, as laid down in the rules promulgated April 23rd?

A. Yes.

Q. (Showing witness Exhibit A.) Among these rules and regulations signed by J. M. Rusk, Secretary of Agriculture, I call your attention to rule numbered two?

A. Yes, sir.

Objection by defendant renewed that Congress had no authority under the Constitution of the United States to make such rules and regulations or pass such law.

Q. This rule reads as follows: "That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1st, 1891, and that these two classes of cattle shall not be allowed to come in contact." Is that the rule?

A. Yes, sir; I enforced that.

Q. Under this authority?

A. Yes, sir.

Q. And when cattle crossed that line, that quarantined line, they crossed it, as you enforced the rules and regulations, subject to that rule and regulation?

A. Yes, sir.

185 Q. You get your authority from this Bureau of Animal Industry?

A. Yes, sir.

Q. Have you had occasion in few or many instances to enforce these rules and regulations?

A. Yes, sir; in a number of cases in Panhandle.

Q. Have you ever enforced them in any instance against the defendant company, The Western Union Beef Company?

Objection by defendant as immaterial.

Q. Do you know anything about the circumstances under which that line was changed with reference to Kimble county?

Objection by defendant.

Q. No, sir; I do not.

Q. Under these rules and regulations are cattle prohibited from being shipped from some one part of Texas to another?

A. Yes.

Q. As well as being prohibited from going to other States and Territories?

A. Yes, sir.

Q. What, in the main, is your duty down there? You are stationed in Texas?

A. Yes, sir; my duties are to see that no cattle are driven or shipped into west Texas or shipped from southern Texas outside of the line into any of the Northern States, except for immediate slaughter.

Q. Are these rules and regulations the only instructions you have?

A. Yes, sir.

Q. And you operate entirely under these instructions given through the Agriculture Department?

A. Yes, sir; get all my instructions from the department.

Q. If it was not for these rules and regulations you would have nothing to do, would you?

A. No, sir.

Q. In your connection with the cattle industry and business of the country, have you ever had occasion to hear or know anything what is called Texas fever?

A. Yes, sir.

Q. How extensive is your knowledge in connection with this disease?

A. I have seen cattle die with it every year since '77, and sick with it every year since '77.

Q. So you have seen something of the disease yourself every year for the last seventeen years?

A. This year too.

Q. In what various States and places have you come in contact with this disease?

A. In the Indian Territory and west Texas, and then two years I was in St. Louis; I seen them there.

Q. You would see them there, I suppose, as inspector?

A. Yes, sir.

Q. Would they get them into the city market with the disease on them, or would you inspect them west?

A. The cattle were usually shipped through from the Indian Territory, and they would have the fever when they were shipped, and when they come in there lots of times be condemned.

Q. Do you know in these cases whether the fever appeared on them before they started or not?

A. Usually a man would not ship a sick animal.

Q. So he could not be able to pick them out as accurately as Mr. Bryant wants him to, to ship the well ones and leave the sick ones. Do I understand you mean to say that *that* you could not tell a sick one?

A. You cannot tell; cattle can mix and they can come in cou-

tact with these southern cattle and they won't show it for two or three weeks.

Q. From your knowledge of the disease, might not a man perfectly honest take out a steer in the Indian Territory that didn't show any symptoms of the disease and then show it when it got to St. Louis?

A. Yes, sir.

187 Q. And wouldn't it be the same case if shipped from Logan county, Colorado, to Omaha?

A. Yes, sir.

Q. What are some of the symptoms, practical symptoms, of that disease?

A. Well, it is pretty near always the same thing. The cattle they quit chewing their cud and stay by themselves, stay around water, get off by themselves, and the urine is bloody; the ears drop right down most invariably.

Q. Anything as to the temper?

A. Of course, they are vicious.

Q. Are they disposed, either when single or in numbers, to give battle?

A. Yes, sir. They are always on the fight when they get in a pretty bad state of Texas fever.

Q. You heard the symptoms described by Mr. Matthews?

A. Yes, sir; just the same.

Q. Those symptoms, are they the symptoms?

A. Yes, sir.

Objection by defendant as not proper cross-examination.

Q. With reference to transporting cattle that are infected with the disease, will they carry it south?

A. Not usually go that way; don't very often take cattle south.

Q. They would not have much experience in that direction. Do you know what the effect would be?

A. Yes, sir; I have seen them buy cattle, these cotton seed and meal feeders, and sell them in Texas, and buy them from west Texas and take them down there and they will die; hardly ever get a man to buy one in west Texas and take him to east Texas.

Q. Do you know how long or whether the breaking out of the disease in these Texas-fed cattle, which are imported into the northern country—what length of time it will be before it will develop itself in the cattle among which they have been put?

A. It is usually about three weeks, but sometimes it is longer.

188 Q. Do you know whether or not it depends any upon the conditions of the weather, the moisture or the ground, or the coolness of the atmosphere?

A. More apt to be Texas fever when it is dry.

Q. More apt to develop quickly when it is dry?

A. Yes, sir.

Q. Do you know whether these conditions of the ground and

grass and atmosphere—that is, went and cool—do you know whether that would delay it?

A. Yes, sir; I think so. I have noticed it years that the grass and everything is dry—that year the fever will be worse. I have noticed it there in Hardeman county, particularly in the last three years that I have been there.

Q. Where were you on or about the 15th of June, 1891?

A. I was at Quanah.

Q. In the State of Texas. What, if anything, do you know about this particular herd of cattle which was shipped about that time from Kimble county, Texas, to Logan county, in the State of Colorado?

A. I was at Quanah the day they were shipped.

Q. Won't you point out on the map where Quanah is?

A. (Witness does so.) This is three hundred miles from Kimble county; Quanah is.

Q. You were only three hundred miles apart, between two and three hundred miles?

A. It took them about a month.

Q. You were here when these cattle were shipped?

A. Yes, sir.

Q. You recognized this herd that was in Colorado as being the same herd that was shipped from there?

A. Yes, sir.

Q. Was Judge Brush there at Quanah when these cattle were shipped?

A. Yes, sir.

Q. What brands were on them, the same as described by the witnesses?

189 A. Half circle, L. C., and some few of them had 7 D connected; some few had. One of them had an "A."

(Mr. BRYANT:) It is the same herd; we admit that. This witness was there at the time the herd was shipped.

Q. Mr. Brush was there in behalf of the company?

A. Yes, sir.

Q. Directing the shipment of this lot of cattle?

A. Yes, sir.

Q. Do you know where these cattle came from?

A. From Kimble county. I know where the range is located. I have seen the cattle in the Indian Territory and knew that they came from there.

Q. Where these same cattle carried from the Indian Territory to Texas?

A. In 1888 or 1889—taken from Kimble to the Indian Territory. I knew that.

Q. Were they taken back from the Indian Territory back to Texas?

A. They just took the steers—this was a beef range down there—and taken the steers to the Indian Territory.

Mr. BRYANT: This herd had not been?

A. No, sir; just the steers.

Q. Then these cattle were brought from Kimble county to Logan county, Colorado?

A. Shipped from Quanah; yes, sir.

Q. Do you know how long they were on the way? How long after they left Quanah before they reached Logan county?

A. They reached Logan county on the 19th or 20th and loaded on the 14th or 15th.

Q. You were not in Logan county on the 19th?

A. No, sir; I got it from the railroad company that they were up there on the 18th or 20th.

Mr. BRYANT: We admit this is the same herd, and unloaded on the 19th or 20th, and admit that he saw them loaded, and Mr. Brush was there, and that he shipped them up to Logan county and unloaded them.

190 Q. When next, if at all, did you see this herd of cattle or any of them?

A. I seen them about between the 3rd and 4th and 5th of October, in Logan county.

Q. That same year '91?

A. Yes, sir.

Q. Were they in the same condition then that they were when they left Quanah, Texas?

A. No, sir; they improved them mightily bringing them here.

Q. I wish to ask you here if there was anything about these cattle, this herd of cattle, that you knew at that time or found out afterwards at any time indicating that they were infected with or would be infected with the Texas fever.

Objection by defendant.

The COURT: Divide the question, and I will rule on each question separately. Leave out about what he found out afterwards.

Q. I will ask you if there was anything about these cattle at the time that they were shipped from Quanah which would indicate that they were infected with the Texas fever.

Q. I was not allowed any discretion in the matter, but my own private opinion was that I would not like to throw them in a herd of my own of northern cattle at the time.

Motion by defendant to strike out the answer as not responsive to the question.

The COURT: That hardly answers the question. The answer may be stricken out.

Q. I will ask you, then, if there is anything with reference to these particular cattle or any of them being infected or having upon them a certain kind of insect.

A. Yes, sir.

Q. Or animal which you have since discovered to be an index of Texas fever?

A. Yes, sir.

Objection to the last question as incompetent.

191 The COURT: In order to make the testimony competent the plaintiffs must show that the defendant knew or by the exercise of ordinary care should have known that it -as Texas fever.

Q. I will ask whether he has discovered this insect since or before.

A. I heard of it in 1890 first.

The COURT: You had better change the form of your question.

Q. You may scratch out "since" and make it, which indicated the Texas-fever infection.

A. Yes, sir; I noticed the ticks on them.

Q. I will ask you to state whether the kind of ticks you noticed upon them is an index or indication of the Texas fever.

Objection by defendant as incompetent and immaterial. Objection overruled.

Mr. BRYANT: I object unless the plaintiffs show it was an indication of Texas fever at that time.

The COURT: I have ruled on it. They must show it at that time, or that the defendant had knowledge in advance of the ordinary knowledge.

A. Yes, sir.

Q. Upon that same subject do you know whether a tick line has been established through that country or not?

A. Since then? Yes.

Q. How long since?

Objection by defendant.

The COURT: The defendant is not bound by them, of course. If the defendant knew that these ticks indicated that these cattle were affected with this fever, it is competent to go to the jury, or by the exercise of ordinary care and diligence, as the science existed, 192 it might have known it, it is competent. It was not bound, of course, by any new discovery of science or the establishment of new lines.

Q. This tick, as an indication of the Texas fever, had been known in the country, you say, a year previous to the shipment of these cattle?

A. I don't know whether it had or not. It had not been talked of much in that country, but I heard of it in Kansas City the year before.

Q. But you heard it talked of in that country?

A. Yes, sir; in '90, in Kansas City.

Q. But you heard it talked of in Texas?

A. No, sir.

Q. Has this Western Union Beef Company been extensively engaged in the cattle business in the State of Texas for any length of time, to your knowledge?

A. Yes, sir; I think so. I think that the company was formed about 1886, I think, or 1887; about the first I heard of it.

Q. And had large cattle interests in Texas all that time?

A. Yes.

Q. One or more ranges or ranches?

A. Yes, sir.

Q. You mean several?

A. Yes, sir; ranches in Kimble and Uvalde counties—Kimble county, Maverick county, Pecos county, Bailey and Lamb.

Q. How many or which of these counties are within the prohibited territory on account of the Texas fever under these rules and regulations of the Agricultural Department?

A. What year do you mean—1891 or 1892?

Q. 1891; yes, sir.

A. Uvalde and Maverick county were outside.

Q. That is not prohibited?

A. They were prohibited.

Q. Kimble county was prohibited first, but let in later in April?

A. Yes, sir.

Q. You say you saw these cattle again along the first days of October, 1891?

A. Yes, sir.

193 Q. Did they have any disease at all?

A. They don't show it. They showed it after in the northern country. You don't see it in Texas on them.

Q. Did they have any disease?

A. You cannot tell.

Q. When you saw them in October?

A. No, sir.

Q. That was too late for the disease?

A. Yes, sir; after an animal has been in the high latitude any length of time they will not get it; ninety days is the usual time.

Q. Can they impart it to other cattle without having it themselves—that is, without showing it?

A. It does not affect them. I have seen Texas cattle as fat as they could be give it to native cattle.

Q. In that condition do they impart it to native cattle?

A. Yes, sir; cattle raised in the high latitude. It is not necessary that Texas cattle give the fever. Cattle from Arkansas or Louisiana give it to the northern cattle.

Q. Where did you see this herd of cattle in October?

A. I seen them in Logan county, Colorado.

Q. How far from Iliff?

A. From Sterling to Crook and ten miles on this side of the river.

Q. All on the same ranges?

A. Yes, sir.

Q. Did you see at the time that you were there any cattle of the plaintiffs, Mullen & McPhee?

A. Yes, sir.

Q. Did they show or have any symptoms of Texas fever?

A. Yes, sir; I seen several that was sick.

Q. Were they sick or dead?

A. I seen them both.

Q. From these symptoms are you satisfied what disease it was?

A. Yes, sir.

Q. And that disease is what is commonly called the Texas fever?

A. Yes, sir.

Q. How many of these sick ones did you see?

194 A. I expect I seen eight or ten, the box J.

Q. Did you see any cattle of any other stockmen down there besides Mullen and McPhee?

A. Yes, sir.

Q. Affected with Texas fever?

A. Evidently; yes, sir.

Objection by defendant as immaterial.

Q. How many of the herds did you see besides McPhee and Mullen's that had this fever?

A. I seen a number of small bunches of cattle around there.

Objection by defendants as immaterial.

A. I know some of Powell's and come of Charris and Barsee, Mr. Rice's; a number of other people; some with Governor Cooper's brand; some L. F. cattle belonging to Brown and——

Q. Did you see any dead cattle?

A. Yes, sir.

Q. Have you any idea how many?

A. Oh, I think I must have seen on the range four or five hundred.

Q. Of course, you could not tell what they died with?

A. No, sir; lots of them there as nothing; was only bones.

Q. What was the condition of the carcasses, of the dead ones?

Q. Why, some of them looked as if they had been dead when I see them for two or three months, just dried hide.

Q. You made no examination of the brands?

A. No, sir.

Q. When you were there in October did you meet with Mr. Brush?

A. Yes, sir; I met Mr. Brush, at Sterling, on the 5th, I think it was, of October.

Q. And did you have any conversation with him as to the death of these cattle, of the disease of which they died?

A. Yes, sir.

Q. What did he pronounce this disease to be?

A. He said it looked like Texas fever; but he could not understand why they had not died before in the length of time.

Q. He didn't know why they didn't die sooner?

195 A. Yes, sir—that is, if they got it from his cattle.

Q. Did you make in your official capacity any report of the condition of things down there?

A. Yes, sir.

Q. To whom did you make that report?

A. I made it to Mr. Robert Dean, Kansas City, who is the man I report to, who is an agent of the department.

Q. As I understand it, Mr. Dean is the agent for all the country west of the Mississippi river?

A. Yes, sir.

Q. And you represented this southwestern country?

A. I represent Texas; my business was in Texas, but he instructed me to report of Texas fever in cattle, and that is the reason I was up there.

Q. Did you make any report in conformity with the facts that you have stated here?

A. Yes, sir.

Objection by defendant.

Q. Have you a copy of the report?

A. Yes, sir. (Same produced.)

Q. Do I understand you to say that you refused to let these cattle of this particular brand to be shipped north or be shipped to Colorado?

A. Half circle, L. C.?

Q. Yes, sir.

A. From Quanah?

Q. Yes, sir.

A. No, sir.

Q. I will ask you to state, if you know, whether cattle coming from that particular region of country, that country, had carried this disease to any other place before it was brought to Logan county.

Objection by defendant as incompetent, immaterial, and irrelevant, unless knowledge is brought home to the defendant. Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. You state in this letter—this is a letter dated October 6th, 1891, to Robert Dean, inspector, Kansas City, written by
196 yourself. I will ask you to state, Mr. Jordan, if this language, which is contained in this letter—

Objection by defendant as incompetent, immaterial, and irrelevant.

Plaintiffs offer in evidence said letter.

Objection by defendant renewed as above and being hearsay evidence.

Q. You were directed to go there by Mr. Robert Dean, United States inspector?

A. Yes, sir.

Q. In conformity with these instructions, you visited that country?

A. Yes, sir.

Q. And you did so for the express purpose of investigating the Texas fever in connection with the Western Union Beef Company and the other cattle in Logan county; that was your mission?

Your instructions were to investigate and report of the prevalence of Texas fever in Logan county?

A. No company's name was mentioned, or anybody.

Q. This is your report in obedience to those instructions?

A. Yes.

Q. And you reported to the same officer who gave you the instructions?

A. Yes, sir.

Q. And he is the United States inspector of cattle industry located in Kansas City, Missouri?

A. Yes, sir.

The COURT: I do not think that the defendant is in any way bound by the report. It is bound by the facts as he found them.

Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. What was the condition of the cattle around there on October 6th, 1891, when this letter was written, as to the Texas fever? Were cattle still having it at that time?

A. Yes, sir.

197 Q. And how far up or down the river did you make your explorations?

A. From Sterling to Crook, about thirty miles, and six or seven miles the other side of the river.

Q. Where were these Western Union Beef Company cattle at that time that had been shipped from Quanah?

A. They were scattered pretty much all over that country.

Q. Well scattered all through the cattle—home cattle?

A. Yes, sir.

Q. How long were you in making these explorations?

A. I think I was down there about four days, is my impression.

Q. And about how many head of cattle did you find or estimate that you found dead or that you knew to be dead?

A. I expect I seen three or four hundred dead ones. Of course, I didn't see all *all* that were dead.

Q. You didn't search thoroughly to ascertain?

A. No, sir. I could not. They died in the rivers and in the ravines all over the country.

Q. State whether or not you forwarded to the inspector Dean a list of the cattle and of the owners of the cattle that had died and the owners of them.

A. Yes, sir.

Q. Do you know how it was with reference to cattle that had been kept apart from these cattle that had been so imported from Quanah, Texas? Your attention called to any such cattle that had been kept inside of an inclosure or had been kept separate and apart from these Texas cattle?

A. Yes, sir.

Q. As to whether they had any such disease or not?

A. Yes, sir; I know. The first man that I met at Iliff was a man named Dillon, and he had put his cattle, he told me—

Objection by defendant.

A. And I went and saw the cattle. I saw them in his pasture, and he told me that he had not lost them——

198 Objection by defendant.

Q. Were they inflicted with this disease?

A. No, sir.

Q. They had no disease?

A. No, sir.

Q. Do you know of any other instances of the same kind?

A. Yes, sir; there was a bunch of cattle of box J that I come in contact with them; they had not lost any. They had been kept away at home away from these other cattle.

Q. Did they have any cattle that had come in contact with them, apart from the ones kept at home?

A. Box J?

Q. Yes, sir.

A. Yes, sir.

Q. Did these that had come in contact with the Texas cattle have the disease?

A. I seen several; yes, sir.

Q. Did Mr. Brush in your conversation with him say anything about moving their cattle? Where did he say he intended to move them to?

A. He told me, or in my hearing, he was going to move the cattle up the river.

Q. About how far?

A. Forty or fifty miles; that is my recollection.

Q. So that he had not moved them on the 6th of October, 1891?

A. No, sir.

Q. He was then talking about moving them? Did you learn where Mullen & McPhee range was while you were in Logan county?

A. Yes, sir; a boy down there told me about it.

Q. Were you on it?

A. Yes, sir; I was up there.

Q. Do you know, Mr. Jordan, when this disease first made its appearance in that neighborhood?

A. Only from what the people down there told me at the time I made a report.

Q. Did you see Mr. Matthews, the representative of the firm of Mullen & McPhee?

A. Yes, sir.

Q. Did you have any conversation with him as to shipping his cattle to the eastern markets in Chicago and Omaha?

A. Yes, sir.

199 Q. Did you give him any instructions or directions?

Objection by defendant as incompetent and immaterial. Objection overruled.

A. Yes, sir; I told him that if he done it that the cattle would be thrown into the quarantine yards—turned in with southern cattle.

(SATURDAY, September 14th, 1894.)

(Same witness continued—Direct examination:)

Q. State, Mr. Jordan, whether or not these cattle of the Western Union Beef Company were the first or only cattle that was shipped by railroad from that part of Texas to Colorado.

Objection by defendant as incompetent, immaterial, and irrelevant.

Q. Or was any other cattle so shipped by rail from Texas, either that year or at any other time, by rail to Colorado?

The COURT: What is the purpose of that?

Mr. MARKHAM: I do not know that there is any particular point it is to be applied to.

The COURT: I think it is immaterial.

Objection sustained; to which ruling of the court the plaintiff duly excepted.

Q. When did you go to Quanah to take or represent the United States in the capacity which you did represent them?

A. In April, '91.

Q. Do you recollect what time in April?

A. Why, I think I got down there the 20th.

Q. The 20th of April? Were any other cattle shipped during that season from the time that you went down there from that part of Texas or from Texas to Logan county, Colorado?

Objection by defendant as incompetent, immaterial, and irrelevant.

200 The COURT: I cannot see that it would be material except from one point of view. If it be contended that this disease was spread all over cattle, it is competent to show that these were the only ones that came up there. If it is not for that purpose I do not see that it is material.

Q. I will ask you to state whether this company shipped any other cattle from there to any point in Colorado during that season.

Objection by defendant renewed.

The COURT: The simple question is whether the defendant's cattle spread the disease through there. It does not make any difference where they were shipped from or where they came from.

Objection sustained; to which ruling of the court the plaintiffs duly excepted.

Q. I will ask you to state whether all cattle shipped during the year 1891, after you went down there, were subjected to these rules and regulations of the Agricultural Department as to quarantine and everything else.

A. Yes, sir; the cattle shipped north from that district under these regulations that year; there was other cattle shipped.

Q. They were shipped, as I understand you to say, subject to these rules and regulations?

A. Yes, sir; all of them.

Q. Do I understand you to say that these cattle were shipped or allowed to be shipped subject to these rules and regulations?

A. Yes, sir.

Cross-examination :

Q. You were first employed, I believe, in April, 1891?

A. Yes, sir.

Q. And were sent to Texas?

A. Yes, sir.

Q. And these rules and regulations went into effect—the
201 changed rules and regulations—on the 23rd of April?

A. Yes, sir.

Q. A few days after you got there? Do you know what the rules were prior to that time—the year before—down there?

A. I was familiar with them for two or three years, but not as much so as I have been since, because it was not my business; it was outside of my business in the year 1890.

Q. The same rules and regulations were in force in 1890 as in force in 1891?

A. No, sir; it did not take in the same counties.

Q. What counties did it take in?

A. In 1890 my recollection now is that it was two counties north of Kimble county left out in 1890; Kimble and Menard county was not in.

Q. They were not allowed to ship?

A. No, sir; they were not allowed.

Q. Don't you know that they were allowed to ship from Kimble county in 1890 and years prior?

A. No, sir.

Q. In 1892 was the first time they were cut out?

A. No, sir; in 1890 Kimble county cattle were allowed to be shipped, but they had to be held ninety days north of Kimble county.

Q. Was that the rule in 1889?

A. I think so; I would not be certain; but in 1890 I am pretty positive that Kimble and Menard counties had to be held north ninety days.

Q. Don't you know that the Western Union Beef Company shipped cattle from Kimble county north in 1890, the same as in 1891?

A. No.

Q. These cattle were shipped and which you know about being shipped, they complied with all the rules and regulations at the time?

A. They did down in Texas; yes, sir.

Q. And in compliance with the rules and regulations of the Government?

A. Yes, sir; in Texas.

202 Q. And you permitted them to be shipped because they had complied with them?

A. Yes, sir.

Q. They were on the trail about thirty days, you say?

A. Yes, sir; it is between two and three hundred miles.

Q. Is Quanah in this district or is it quarantined?

A. Quanah is in the district that lets cattle come to Colorado and Montana, but we are outside of the "Government safe arrear" line, what we call the "safe arrear" line at that time, where cattle that were permitted to go from Texas to any other point in the United States.

Q. Then you say this line took in Wyoming, Colorado, and Montana?

A. Yes, sir.

Q. Then there was a further line where they could not go anywhere?

A. Yes, sir.

Q. Kept for immediate slaughter?

A. Yes, sir.

Q. This quarantine line, what is called quarantining Texas fever, ran clear across the country?

A. Yes, sir.

Q. Includes Virginia, North Carolina, and South Carolina?

A. Yes, sir.

Q. Cattle from that country are just the same as from Texas?

A. Yes, sir; cattle from a low altitude.

Q. It runs diagonally, commencing at New Mexico, clear to the Atlantic coast?

A. Yes, sir.

Q. Somewhere to the middle of Virginia?

A. Yes, sir.

Q. Includes Kentucky and Tennessee?

A. No, sir; not Kentucky.

Q. Or Tennessee?

A. Yes, sir; part of Tennessee.

Q. And all the territory south?

A. Yes, sir.

Q. What is called Texas fever is really—it means southern fever?

A. Yes, sir.

Q. And the cattle south of this line clear to the Atlantic coast are subject to the same regulations?

A. Yes, sir.

203 Q. After these cattle were shipped on the cars at Quanah and had left your jurisdiction, you say they complied with all the rules and regulations?

A. Down there; yes, sir.

Q. And you never saw them again until October?

A. No, sir.

Q. Then you saw them down there at Crook, between Crook and Iliff, that you saw these cattle? When you saw these cattle, were

most of them chasing across the river and being driven back by Mr. Matthews so that they are out of mischief?

A. When I was there they were branding their calves—when I was there.

Q. The Western Union Beef Company?

A. No, sir; the box J outfit, the old brand.

Q. Did you notice whether they were keeping busy most of the time driving the cattle across the river?

A. No, sir; not at that time.

Q. Don't think they were doing that?

A. No, sir.

Q. Did you notice that these Western Union Beef cattle had a tendency to keep crossing the river every day?

A. No, sir; they were scattered all through there; I didn't notice any of the others at all.

Q. Did you notice that the box J were on both sides of the river?

A. No, sir.

Q. And the cattle mixed up?

A. Box J were mostly on the north side of the river.

Q. They had them herded?

A. Apparently they were located on all sides of the river.

Q. You say some of them were kept in pasture and didn't take the fever; do you know how many there were?

A. Why, there was just a little bunch of twenty-five or thirty; I never counted them.

Q. You say you saw some that were sick with Texas fever; 204 you only saw eight or ten box J. Is that all you saw or that were sick?

A. I know I seen a few others at that time; I don't remember the number; just seen a few.

Q. Just a few others box J?

A. Yes, sir.

Q. You think you didn't see over eight or ten box J that were sick?

A. At that time; yes, sir.

Q. Had there been any frost at that time, do you know?

A. No, sir; there had been no frost.

Q. And you say the box J, as to condition, were in pretty good condition?

A. Those that were well were all right, but some that looked as they were just recovering from sickness that didn't look well.

Q. How many of those were there?

A. What do you mean?

Q. That looked as though they had been sick and getting over it?

A. Probably, my recollection is now, thirty or forty; something like that.

Q. What class of cattle were they?

A. Big cattle.

Q. Market cattle?

A. Yes, sir; cows and steers.

Q. What class of cattle were more apt to take the fever?

A. Why, American cattle; it apparently goes harder with them than others.

Q. Calves hardly ever take it?

A. Not very.

Q. You say there was no frost. You don't know that?

A. I was there about four days and if there was any frost it was very slight.

Q. I mean you don't know whether there was any before that?

A. No, sir.

Q. No frost while you were there?

A. No, sir; and the grass didn't show it.

Q. This Texas fever is indicated, in your judgment, by the tick, I believe?

A. Yes, sir—that is, I believe it now.

Q. That is a late theory?

A. Yes, sir.

Q. Now, the Government at that time, according to their rules and regulations, thought it came from manure?

A. Well, that was a supposition at that time.

Objection by plaintiffs.

Mr. MARKHAM: I don't know that the Government is capable of thought.

Q. What I mean is the regulations sent out by the Bureau of Animal Industry were based on the theory that it was carried in the manure of the animal.

A. I don't know as to that; the instructions say that the car should be cleaned.

Q. The manure taken out and disinfected?

A. Yes, sir.

Q. And that was the prevalent theory at that time?

A. In 1889 and 1890 they commenced to think there was a tick that was carried. The department—

Q. Isn't it a fact that it is communicated by cars that Texas cattle have been in?

A. Yes, sir; it had been carried in cars—the tick had been carried in cars.

Q. When they happen to fall out the car while going over the country the tick falls on the ground and the cattle come across that and they will get it in that way?

A. It has been known that cattle did get the fever from where cars have been cleaned.

Q. Where the stuff was turned out?

A. Yes, sir.

Q. And that probably shows if it was in the manure, if that theory was correct, it would come from the manure. If the tick theory is correct it comes from the tick?

A. The tick is in the manure.

Q. And cattle in cars travelling through the country, the manure falls out?

- A. I never knew a case like that; it might occur that way; it might.
- 206 Q. Or if any Texas cattle—frequently occurred or does occur—where they had been driven along the road and other cattle cross the road afterwards?
- A. Yes, sir.
- Q. Occurs in that way?
- A. Yes, sir.
- Q. Now, with reference to these rules and regulations, had you any discretion in changing them or anything of that kind?
- A. No, sir; none whatever.
- Q. Do you know Mr. Watson Pickerl, inspector?
- A. Yes, sir.
- Q. What was his authority?
- A. Mr. Pickerl was agent of the Secretary.
- Q. Of the Secretary of Agriculture?
- A. Yes, sir.
- Q. What was his authority in general?
- A. I don't know; I never had any business with Mr. Pickeral at all. I met him two or three times.
- Q. Was he out here when you were here?
- A. I met him at Denver; yes.
- Q. The same time?
- A. Yes, sir.
- Q. Do you remember Mr. Pickerl telling you about any instructions he had given the sanitary board of Colorado?
- A. No, sir.
- Q. Didn't have any conversation with him?
- A. No, sir.
- Q. He was the special agent of the Secretary himself?
- A. Yes, sir.
- Q. Acting for the Secretary?
- A. Yes, sir.
- Q. And the Secretary had the right to promulgate these rules?
- A. Yes, sir.

Redirect examination:

Q. When you say that they complied in shipping these cattle with the rules and regulations of Texas, do you mean by that to say that this Western Union Beef Company complied with the rules and regulations of the United States?

A. Texas had no regulations at all; the Western Union
207 Beef Company in this case complied with the department's conditions in Texas.

Q. You mean that they complied with the rules and regulations at that end of the line?

A. Yes, sir.

Q. You don't mean to say that they complied with the rules and regulations all through?

A. No, sir.

Q. In Logan county ?

A. No, sir.

Q. With reference to this tick business, is it an ascertained fact that, so far as you know, whether the tick precedes the disease or whether it follows—that is, whether the disease generates the tick or the tick generates the disease?

A. I think the tick generates the disease, carried the blood from one animal to the other, from the southern animal to the northern.

Q. State, so far as you know or if you know, whether there is at the present time any well-defined, well-settled opinion as to what is the cause of the disease.

A. It is the theory of the department that it is the tick theory.

Objection and motion to strike out by defendant as not responsive to the question.

Q. I will ask you whether there is a general agreement of opinion as to what does cause this Texas fever.

A. Among my acquaintances that studied that question any it is the theory that the tick carries it to the animal.

Objection and motion by defendant renewed.

Objection and motion denied.

The COURT: Of course, the defendant is only bound to exercise such care and caution under the circumstances of the case as then existed. It is not bound by any new theory or any theory of any particular class.

Q. I will ask you to state whether or not there is a well-settled opinion as to the fact that Texas cattle imported or exported
208 from that region of the country at that season of the year to a higher or northern latitude, such as the northern part of Colorado, coming in contact with other cattle, would impart this disease to these other cattle.

Objection by defendant to the form of the question, no time being given.

The COURT: I think it should be confined, or prior thereto, when these cattle were shipped.

Q. I mean at the time that they were shipped at that season of the year.

Mr. BRYANT: What time of the year?

Q. I mean in June, July, and August—any year.

Objection by defendant.

Q. In the year 1891 ?

A. At that time I don't believe I heard anything said about it at that time.

Q. But I mean whether as a general thing—your long experience—there would be danger under the circumstances of communicating such disease.

Objection by defendant.

Q. Whether, in your opinion, from your knowledge of this dis-

ease and of cattle, all the circumstances of the case considered, so far as you know, there would be danger of these particular cattle carrying with them and communicating to the cattle in the northern part of the State of Colorado the disease Texas fever.

Objection by defendant to the form of the question, and incompetent, immaterial, and irrelevant.

The COURT: You will have to confine your question and the answer must be confined to a time prior to the time when these cattle were shipped.

209 Q. I mean at that particular time, from his knowledge of all these facts up to that time, whether, in your opinion, as an expert, there would be danger of these cattle carrying to the northern part of Colorado and imparting to the other cattle the disease known as Texas fever.

Objection by defendant renewed, as before.

The COURT: He may answer the question in this way: Confine your answer to your knowledge of the subject as it existed at and prior to the time when these cattle were shipped; not as to opinions that you have formed since that time.

Objection overruled.

A. Yes, sir; I would be afraid of it.

Motion by defendant to strike out the answer as not responsive to the court's question.

The COURT: That may be stricken out. The question is: What was the general opinion prevailing at and prior to that time on this subject among the people who were conversant with the cattle business as to importing cattle from that region of Texas to the county of Logan, in the State of Colorado, at that time?

Mr. BRYANT: He ought to be asked first whether there was a general opinion—the general opinion among cattlemen.

Q. I will ask whether there was any opinion as to danger under these circumstances of imparting this disease known as the Texas fever to cattle in the altitude of north Colorado.

A. Yes, sir.

Q. What was that opinion?

A. That that county was too low down to be admitted to the—rather, that that county should be stricken out.

210 Motion by defendant to strike out the answer.

The COURT: By that county you mean Kimble county?

A. Yes.

Motion renewed as not responsive to the question.

Q. Was this the opinion, that it would be dangerous to transport cattle from down there to the northern part of Colorado, or was it not?

A. Yes, sir.

Q. It was thought that it was dangerous?

A. Yes, sir.

Recross-examination :

Q. You say that this tick carries the blood from southern to the northern cattle?

A. Yes, sir ; that is the belief.

Q. That is not the theory of Dr. Samuels, of the Bureau of Animal Industry, that it does carry the blood, but young ticks get in the blood of northern cattle and poison their blood?

A. Yes, sir ; I believe so ; it is the tick that does it.

Q. The young tick—the little tick ?

A. Yes, sir.

Q. Isn't it the theory that the southern animal going to the North carries these ticks on their body ?

A. Yes, sir.

Q. They don't hurt them a particle?

A. No, sir.

Q. The females then drop off and hatch out a lot of small eggs on the ground, which get on the north cattle, and they get into the blood and poison the blood of the northern cattle?

A. Yes, sir ; that is it, I think.

Q. How long had you been in that part of Texas in 1891 when these cattle were shipped?

A. I had been there since the 20th of April.

Q. You had only been there a few days. You didn't hear of this until several days after it was promulgated?

A. Before I left Kansas City I heard them talk that they were going to try to change the line.

Q. Move it south?

A. Yes, sir.

211 Q. Now, when you talk about the general opinion of cattlemen of Texas, had you been there long enough to learn what that opinion was?

A. I had been acquainted with Texas cattle sixteen or seventeen years.

Q. Met them in St. Louis?

A. And on the Cherokee strip.

Q. In the Indian Territory?

A. Yes, sir ; I was at Kansas City.

Q. You hadn't been long enough in that part of Kansas City to get the opinion of the cattlemen there?

A. Yes, sir. I had been there when these cattle were shipped. You see, I had been there two months and had had a good deal of trouble with a herd of cattle at Childress, and there was a meeting of the cowmen at Childress, Texas, in the Panhandle. I had stopped a herd of cattle there, and they had gathered there to see what disposition was going to be made of them, and the talk was there that the line was too low down.

Q. When was that?

A. That was about the 20th of June ; it was about the 10th or 12th of June.

Q. But the Bureau of Animal Industry, that had made the ex-

amination, thought it was far enough north and issued its regulations?

A. I suppose so.

Q. How far north have you seen these ticks? Did you ever see them up in the Panhandle of Texas?

A. No, sir; none up there. I have seen them carried there by other cattle, but not all cattle.

Q. Never saw them grow there?

A. No, sir. I could show you on the map how far up it goes in Texas.

Q. The same as the quarantine line?

A. No, sir; south of that; east of it; yes, sir. The tick line is across timber; goes right along that line, and the tick goes right along that line across Texas. Last year the department told

212 me to see—to find out—how far west these ticks were in Texas from Red river to the Texas-fever road.

Q. And you made an investigation of it?

A. Yes, sir; I rode across it.

Q. You say it runs across the timber line?

A. Yes, sir; what is called across timber in Texas. The ticks run across that line there.

JUROR: What are these ticks, a louse?

A. A good deal like a tick on a dog.

JUROR:

Q. They drop off onto the ground and lay their eggs?

A. Yes, sir.

JUROR: Was there any conversation in regard to these ticks when these cattle were shipped?

A. No, sir.

Recross-examination continued:

Q. You were not in Texas yourself, were you, in 1890?

A. Yes, sir; the winter, I think I was. I was last in Texas in January and February of 1890.

Q. (Showing witness diagram.) Is that a correct diagram of these ticks?

A. Yes, sir; that looks like them.

Q. What is issued by your bureau?

A. Yes, sir.

Diagram shown to jury.

Q. That shows the big one and the little ones and the eggs and all?

A. Yes, sir.

Q. Is that the natural size as shown there?

A. Yes, sir.

Q. I understood you to say that they were not talked about at that time?

A. No, sir; they were not.

W. J. POWELL, a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct examination:

Q. Where do you reside?

213 A. Well, I live in Sterling, Colorado. I have a ranch just below Iliff, Colorado, sixteen miles from Sterling.

Q. Where were you living in 1891?

A. I was living—my family were living in Sterling. I put in the whole of my time on the ranch that spring, in 1891.

Q. Where was your ranch?

A. It commences four miles below Iliff, on the north side of the Platte river, laid contiguous to the river. I come down to the river and two miles to the river front.

Q. How far did you say your ranch was from Iliff?

A. About three and a half miles to four miles; I think it commences in further than that.

Q. How far is your ranch from the ranch and range of Mullen and McPhee?

A. Their home ranch, I am about eleven miles, and I am in McPhee and Mullen's range; I join them in that range.

Q. Are you engaged, or were you at that time, to any extent in the cattle business?

A. Yes, sir.

Q. Where were your cattle?

A. Running with the plaintiffs' cattle.

Q. On their range?

A. With their cattle, on their range.

Q. And to any extent mixed with the cattle of Mullen and McPhee?

A. Yes, sir; thoroughly mixed.

Q. They were not then confined to your ranch?

A. No, sir; I let my cattle out on the range in the spring, early. I let them out somewhere in March, that year, or tried to keep the greatest number in the winter, and take care of them and let them go in the spring and run them with McPhee and Mullen's outfit.

Q. Do I understand you to say that you brought them into your ranch in the winter time?

A. What I could find of them I put on the ranch in the winter to take care of them, especially the cows and calves and such as are liable to die.

214 Q. Was your ranch enclosed?

A. Yes, sir; every acre of it—that is, the land that belonged to me, not the lands that I have leased.

Q. About what size of ranch was that?

A. 1,760 acres in the enclosure.

Q. About how many cattle did you have at that time?

A. About four hundred head.

Q. What kind of cattle?

A. American cattle.

Q. As to beef cattle or cows?

A. As a bunch of cattle would run, a bunch of cattle; part beef, cows, calves, and young stock, yearlings, two-year-old-, etc.

Q. How long have you been engaged in the cattle business in that neighborhood?

A. In that particular line of business since 1888.

Q. What do you mean by that particular cattle business?

A. I had been in the cattle business before and gone out of it and gone in other business and then gone back in the cattle business.

Q. When you were first engaged in the cattle business was that in this same neighborhood?

A. Yes, sir; same range; the first cattle I had on that range was in '76.

Q. Do you know anything about the time at which this herd of cattle was brought up from Texas by the Western Union Beef Company and unloaded at Sterling; do you know anything about when they were unloaded?

— Only from hearsay; I didn't go to Iliff during the time they were branding; I heard they were branding.

MR. BRANT:

Q. They were unloaded the 19th of June?

A. I never saw the cattle—that is, when they were unloaded.

Q. When was the first time that you saw or knew that these cattle brought up from Texas by the Western Union Beef Company were in that neighborhood?

A. They got on my pasture close to the railroad; I think either the next day or the day after that that I heard that they unloaded them at Iliff—a black steer—and I ran him out, and he was a fresh-branded steer.

Q. When was this, about the 21st of June?

A. Well, somewhere about that; I could not say certain. I noticed the steer being in there and went down and drove him out and noticed he was branded with this cross half circle.

Q. Did you notice anything afterwards of this herd of cattle belonging to the Western Union Beef Company?

A. Yes, sir; considerable of them.

Q. Where did they mostly range, if you know?

A. The bulk of them were turned on the south side of the river below their ranch down to what is called the Lone Trees; ran down there about five miles in extent of country; that is directly opposite my ranch on the north side of the river; I saw the cattle every day and heard they were there.

Q. How soon after the 19th or 20th of June was it that you knew about this herd of cattle?

A. I should say not over a day; I saw the cattle—what I took to be the cattle—saw them running across the river and into the pasture that I drove them out of, and I saw what I took to be two or three dozen cattle directly opposite to me on the south side of the river.

Q. State what, if anything, you know in reference to what, if

any, efforts were made by the Western Union Beef Company to keep them separate from the other cattle in the neighborhood.

A. I know of no effort, except probably they have sent a herder to turn them back there down the river on the south side; I think I saw a day herder probably stay an hour and go back to the ranch and turn the lower end, going down to Mr. Rice's fence, swing
216 them back up the river farther half a mile of so and then go to the ranch.

Q. How often did that occur?

A. I don't recollect seeing him possibly over three or four days or week.

Q. Do you know the number of cattle in a herd; about the number of cattle in the herd of Mullen & McPhee?

A. Well, I should say between thirty-five hundred and four thousand head that year. I was on the round-up that year; helped the boys.

Q. You had nothing to do particularly with the cattle of McPhee and Mullen?

A. Nothing.

Q. Were there other cattlemen in that same neighborhood immediately or contiguous thereto?

A. Quite a number of small stockmen that own from fifty to two or three hundred head around contiguous to that country.

Objection by defendant to testimony in regard to the owners of other cattle.

Q. State whether it was the habit of a large herd of cattle, containing as many as the herd of the Western Union Beef Company did, to range over a large extent of country.

A. Yes, sir; especially if they are new and branded. It seems to make them want to go when branded; they travel more then. It makes them restless, I suppose. That is my experience with cattle. They are on a strange ranch and are restless and range and travel a great deal; hard to hold.

Q. Do you know anything about this disease that broke out among the cattle down there during the month of July or August?

A. Yes, sir; I checked up that cattle, the greater part of it.

Q. When and where did you first know or learn anything about this disease?

A. Do you mean the first dead animal I saw or the first intimation I had of the disease?

Q. The first information you had of that disease, whether the cattle was dead or not?

217 Mr. BRYANT: We don't mind his telling what he knows, but not what he heard about it.

Q. Unless somebody told you something and you went and examined it; the first knowledge of your own that you had of it.

A. The first knowledge was communicated to me.

Q. Did you act on that communication?

A. I saw the dead cattle that the party claimed had died with Texas fever or something; he didn't know exactly what it was. He asked me an opinion in regard to it.

Q. Did you go to see that dead cattle?

A. Two days afterwards I saw a cow that died and two or three brands besides that, and I had seen one dead animal before that day, before he came to see me, but I didn't think about Texas fever or anything then. I went to the animal because it was something to see a large, fat animal lying dead on the prairie; it was alongside my fence. That was about the 15th day of July, and went and examined it, but didn't know what was the matter with it.

Q. You didn't see that particular animal until after it was dead?

— No, sir; didn't see it until it was dead. It was swelling considerably, and I could see from where I am haying in the field. I commenced haying on the 12th; I say I know it was very near that time.

Q. Did you say you saw other dead cattle at the same time?

A. The time I went to Iliff, quite awhile, probably ten days or two weeks, after I saw this first dead animal that lay alongside of my fence.

Q. I asked you did you see any other dead cattle?

A. No, sir; that is the only one that I saw at that time here about July 15th.

Q. How soon after that did you see, if at all, anything
218 more of dead or sick cattle there or in that neighborhood?

A. I think this party came to me somewhere near the 25th of July or the first of August and asked me if I knew anything in regard to Texas fever. I told him I didn't. Wanted an opinion of me in regard to this disease. I knew nothing of it. I told him I could not assist him; could not do him any good. I went to Iliff a few days afterwards, as I noticed a large red animal lying on the side of the water, about a mile and a half, say, of Iliff. I went and examined her. She was very badly swollen, eyes popping out of her head almost, and she belonged to the Hampton Live Stock Company. Just about half a mile west of that, on towards Iliff, I struck another cow; she was dead. On the other side of the railroad track, built to river—I can possibly explain the position—it is material, probably—on this map.

Q. You can point it out.

A. Iliff is just right in there, one hundred and sixty acres of that section. Now, between there and the river or right in there, along in there, was where these cattle of Mr. Dodd, who spoke to me in the field, lay. When I went to Iliff I rode across the track. I knew his cattle personally, because he kept them right there around the station all the time. These other cattle were down the river-side fence, in section 15, and runs across the track and into the river, and then that is my place, this 1,760 acres I spoke of, and then these cattle were right along about in this country here, right along there (indicating). That is the cattle he wanted my opinion on in regard to Texas fever—lay in this country here, five or six head of them; in fact he lost everything except a calf.

Q. He was a cattleman on the small scale himself?

219 A. No, sir; he was section foreman for the railroad.

Q. He had some cattle?

A. A lot of milch cows and calves.

Q. What next about this disease? You saw these dead cattle?

A. Yes, sir; I saw these dead cattle.

Q. That was about the 25th of July?

A. Somewhere near there or the first of August; it is a matter of memory. I made no date, but I judge by the time I was working in the field.

Q. Did you see any sick cattle at that time?

A. After I returned to the ranch, probably five days or a week, I noticed an animal standing by itself close to the railroad track, right about there somewhere (indicating). I was haying down in this part of the field, you understand. We left the mowing machine and went over on foot and got on the top of the railroad track, and I saw he was inclined to be not very sociable and I didn't go very near to him. I was probably as near to the wall—he looked very bad, running at the eyes, and the ears drooped forward, and looked very rough, hair turned the wrong way, and I saw that he would die, and I didn't dare to go anywhere nearer him on foot. I went back to my work the next morning this steer was dead, apparently right in his tracks; appeared to be exactly in the same place where he was before. I got the sectionmen to bury him. That was a three-year-old box J steer, belonging to Mullen and McPhee, and included in this list of checked cattle.

Q. Did you see any sick cattle after that?

A. Not for quite a while.

Q. Where did you see the next?

A. The next I saw were dead and sick. It seems that the bulk of these cattle did not cross the river, but stragglers in small lots came over. I could see them every day in small bunches, but the bulk of the cattle were turned down upon this isolated—this
220 & 221 small range below Hiff, about five miles, and then a large pasture owned by Rice. It seems the river went down about the first of August, and they had just gotten this land cleaned off, and then, I suppose, a thousand head of them crossed on this section of land right here, section 32. There is good feed there.

Q. Whose range is that?

A. McPhee and Mullen's section of land. I noticed a great increase in the number of cattle. We are always interested in that sort of thing, and I got on a horse and went down and rode among them to see if I could see anything sick or dying. At this time I was apprised of Texas fever and looked out for it. If there was any sick ones there, I did not see it; but I didn't know anything about Texas fever and never paid any attention to it then until some time along about the first of September; then the boys who were working on the ranch wanted to know what the intense stench was that came when the wind blew from the east. I said I would get on a horse and go down and see, and I rode down; I think it was either

the seven or eighth of September, and when I got down upon this section there was at least fifty head of dead cattle lying there—large steers and cows, all swollen up, with their feet in the air—and while I was down I commenced checking my cattle. I found five or six of my own cattle; some of them almost destroyed. They had been dead, apparently, longer than—they were over next to the fence, where I didn't go when I was down there the first time, and I don't know just exactly when I was up there. When up there I went on this trip in regard to this smell and I met Mr. Matthews and Mr. Greenmen, I think, coming up looking at the dead cattle.

Q. That was along, you think, towards the 7th or 8th of September?

222 A. Yes, sir.

Q. How many was it you think you saw dead at that time?

A. There must have been fifty head in sight.

Q. What was the condition of the carcasses?

A. Well, they were very much swollen.

Q. I mean as to decomposition.

A. Some—I should say three-quarters—of them were. While they were very much swollen as well, at the same time they could be identified without any doubt.

Q. Could you tell by any means or knowledge that you had how long or about how long these cattle had been dead?

A. Well, I could make a reasonable inference; that is about all.

Q. You are used to seeing at times cattle that had died, are you not?

A. Most of the cattle were lost in the winter; but they do not swell up in the winter like summer. We hardly lost any all summer, except one may be struck by lightning. I never paid any attention to it; a dead animal ceased to be novel.

Q. State, as near as you can from the appearance, how long these cattle had been dead.

A. Well, I should say from two weeks to a day.

Q. Lying dead long?

A. Yes, sir. Some of the carcasses were very much more decomposed than others.

Q. Were any of them in a far state of decomposition?

A. A few of them were; a few of them were past identifying.

Q. Did you observe how many cattle after about that time that were sick with the fever?

A. Yes, sir; there was quite a number of cattle in that bunch then. It was very plain to me to see they were affected by the same disorder, because any one, most inexperienced man, could tell that by looking at them at that time.

Q. From what you saw of these stock or sick cattle afterwards did you form any opinion as to what was the matter with
223 the first one you saw?

Objection by defendant.

Q. I will ask you, then, what were the symptoms of these cattle

that you saw sick, as compared with the symptoms of the first one that you saw about the 15th of July?

A. I should say exactly the same. I inferred that the first one that I saw near the railroad track, that was about the 25th of July or August, the conditions were exactly similar.

Q. The conditions were the same?

A. Yes, sir; as far as I could see.

Q. You didn't know anything personally of the Texas fever yourself?

A. No, sir; only what I learned. I think I could tell an animal now that had it in an advanced stage. I think I know the symptoms pretty well now.

Q. State whether, of your own knowledge, any such disease as this, whatever it may have been, had ever made its appearance in that neighborhood during your stay there, either before or since that time.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

A. My knowledge has only been hearsay in that respect. I never saw any.

Q. I asked you what you knew yourself.

A. I don't know anything about it. I never saw it.

Q. I will ask you whether any such disease as this, no matter what it was, ever appeared, to your knowledge, there, either before or since.

A. The Pawnees. I cannot explain exactly.

Q. I asked you whether any such diseases—

A. I said my knowledge in that respect would only be hearsay. I had never come in personal contact with it.

224 Q. I asked you whether, of your own knowledge, any such disease ever appeared there before.

A. No, sir.

Q. Before or since? I didn't ask you what somebody else —.

A. Not of my own knowledge; I don't know.

Q. Do you know of any cattle in that neighborhood which were kept away from—free from these cattle of the Western Union Beef Company?

A. I know of three lots. Three lots were kept in pasture.

Q. State whether, if you know, the cattle which were kept excluded from these Texas cattle had this disease or not—whether any of them had it.

A. They didn't, to my certain knowledge. I saw the cattle; part of them were mine. I had my own excluded in pasture.

Q. Further, upon that point, do you know of any cattle which were enclosed and into which enclosure these Texas cattle got?

A. Yes, sir; I know of one instance right next to me.

Q. What was the result in that instance?

Objection by defendant to the introduction of any evidence regarding other cattle than those of the plaintiffs being incompetent. Objection overruled.

Q. He lost all of the cattle the party had, almost.

Q. Was that from this disease, do you know?

A. I know it from the fact these cattle broke into his pasture. He had a bar fence along the river side—in the L. F. pasture—a fence winds with the river, and a few head of these affected cattle broke in, and this man lost his entire lot of cattle, Mr. George A. Hughes. I saw the cattle in the pasture dead. He was a next neighbor to me; my fence adjoins very near to him.

Q. Have you any means of knowing the number of cattle belonging to McPhee and Mullen that died?

225 A. I took a certain number in conjunction with Mr. Greenman and myself and Mr. Matthews, all at the same —, although he didn't do any checking. We did the checking.

Q. Did you help to hunt up the dead cattle?

A. We all did; but we made this agreement at the start, to systematize the matter. Mr. Matthews was to do the searching and hunting, and wherever we came across ours, myself and Mr. Greenman or himself, that we would go together and check the cattle together, in order to have two of us there to give any testimony, and while I was with Mr. Greenman every cow he checked I checked, every one I checked he checked, every animal I should see.

Q. With these cattle that were so checked, did you examine the brand?

A. Yes, sir. Those that we could not tell anything in regard to the brand we let go—didn't put it down at all; we didn't do that.

Q. You didn't check or keep account of any except you could recognize it by the brand; that is all?

A. Yes, sir.

Q. What brand was that?

A. We took and checked a great many brands.

Q. I am speaking of the McPhee and Mullen.

A. Box J.

Q. Did you find many you say you didn't check unless you could distinguish the brand?

A. Yes, sir.

Q. Were there many or few in such a state of decomposition that you could not distinguish the brand?

A. Yes, sir; I should say at least a third or fourth of them, especially those that lay in the river seemed to go to pieces a great deal quicker—wash away.

Q. What had become of the brand of these cattle where it could not be distinguished?

226 A. Well, if the animal lay on the brand side—would lay with the brand next to the ground, and insects had destroyed the hide—when you turn them over there was nothing there except the skeleton.

Q. When that was the case you didn't keep any account of it?

A. When one had been dead quite a while and brand side lay up we could tell what it was, no matter how long it had been dead. If the other side lay down you could not tell anything about it.

Q. In your opinion there was a third or fourth of them that were

so destroyed that it could not be distinguished, and you kept no account of those at all?

A. At least a quarter; yes, sir; I am satisfied of that.

Q. About what time was this count made?

A. I think we commenced on the 8th day of September. I am not certain. It was the 7th or 8th.

Q. Somewhere along there?

A. Yes, sir.

Q. Have you any means with you at present by which you can tell how many and what kind of cattle of Mullen and McPhee were dead?

A. By the list I made out and the record I have.

Q. Have you got it with you?

A. No, sir; I haven't got it. It was this list that you had here yesterday. I seen the book of original entry here. I haven't it here today.

Q. Do you know without reference to that—Mr. Matthews has that list and he is not here—how many cattle there was?

A. How many I checked up?

Q. How many you checked up—how many do you know of your own knowledge?

A. Of my own knowledge eighty-three head.

Q. You say you didn't check up all?

A. I didn't check up all.

Q. Who checked up the other ones?

A. Mr. Matthews and Mr. Greenman checked up the balance of them. I checked a certain length of time with them, and I had to go back to work.

Q. Do you know how many of these eighty-three were beef cattle?

227 A. No, sir; not without reference to the list.

Mr. BRYANT: We have a copy of the list. Same produced.

Q. Can you tell from this list whether that is correct or not (handing witness copy of list)?

A. As far as this list is concerned, I can say these eighty-three head are all the cattle I checked.

Q. These eighty-three head on this list are the cattle that you checked?

A. Yes, sir; in conjunction with Mr. Greenman.

Q. Take that list. Can you, by refreshing your memory, tell how many of the different kinds of cattle these eighty-three head consisted of?

A. I would simply have to read this list.

Objection by defendant.

Q. Can you look at that list and tell? Refresh your memory, yes or no.

A. Yes, sir; I think I can.

Q. That calls to mind, does it, the number of each of them, so

that you could testify as to the number after looking at that list?

A. Yes, sir.

Q. How many head were there? Divide them if you can.

— There were eighty-three head; one bull—the greater part of this list was cows—fifty some odd cows—and the balance were two or three year old steers. The greater part of the cattle were cows that died.

Q. You didn't keep any count of the calves in making up that list?

A. There was no calves checked up. There was a good many calves running round on the prairie, but we didn't check them.

Q. Did you find any dead calves?

A. I think I saw a few at the time I was checking. I would not be very certain. There was a great many motherless calves running on the prairie at that time.

Q. That is a division, as near as you can come at it, one bull and fifty odd cows, and the balance two and three year old
228 steers?

A. That is my recollection of it; yes, sir.

Q. Along with this list of cattle are certain values or prices attached on a separate piece of paper. By whom was that made out? I will show it to you. (Same handed to witness.)

A. I made that out myself under the statutes of Colorado.

Q. That is what I am getting at. That was made out under the statutes of Colorado in what kind of cases?

The COURT: There are none but the railroad cases.

Mr. MARKHAM: Yes, sir; that is all, and I want to show this was taken from the railroad cases.

The COURT: That will be of no value. You will have to prove the value.

Q. From your experience in the cattle business, are you familiar with the value of cattle?

A. Yes, sir; I think I am.

Q. Were you familiar with or acquainted with the values of cattle at that time?

A. Yes, sir.

Q. You have been buying and selling cattle more or less all the time?

A. Yes, sir.

Q. You have been buying and selling cattle?

A. Yes, sir.

Q. What was the value of the bull on that list?

A. Well, McPhee and Mullen had valuable bulls. They were worth more than the statutory price.

The COURT: Do not make any reference to the statutory price.

Q. You mean, then, what I would place the estimate on the bull?

Q. What was the value of that bull, the market value?

A. About forty dollars.

Objection by defendant.

Q. What was the market value of that bull such as that was?

229 A. I should say, to use on the ranch, the bull was worth forty dollars. I would be willing to pay that price for a bull of that kind.

Q. Is forty dollars the value you would put on it, not for any particular use, but just what is the value, from your knowledge?

A. I bought and sold bulls—

Q. What was the value of this box J, just to whatever use you could put to that?

A. Two-years, twos, twenty to twenty-two dollars; threes, thirty to thirty-five dollars.

Q. And these cattle were two and three years?

A. Yes, sir; according to my recollection.

Q. Were any of them of any other age on that list except two and three years? Here are some put down from three to eight years of age. If they were four years old, what would be the value of them?

A. Thirty-five to forty dollars—steers; I mean native steers.

Q. If they were three years of age, what would be the value of them? Would that change it any?

A. They would not be as heavy; they would be worth from thirty to thirty-five dollars.

Q. Do you say if they were native steers? Were some of these Texas steers or other than native steers?

A. My recollection is that I checked up a Texas steer or two on that list.

Q. What were Texas steers worth?

A. I would say twenty-eight to thirty dollars, of three and four year old.

Q. How many bulls were there, that you recollect?

A. On the list that I checked up?

Q. Yes, sir.

A. My recollection is —; might have been more, but it has been three years since I—

Q. I don't know what is the amount of that. You can look at that and see if there was one or more (showing list).

A. It has been three years since I checked these cattle up. Yes, sir; I do; I recollect just where they lay exactly—right north
230 of McPhee and Mullen's range—three or four bulls. Since you speak of that subject, I recollect seeing them and could go right to the place where they lay.

Q. What was the value of these cows?

A. I should say eighteen to twenty dollars. The majority of them were large cows.

Q. Were they American cows?

A. Yes, sir; what we call native cattle.

Q. What was the value, if you know, of the heifers?

A. What is their age?

Q. They were two-year-old.

A. About thirteen to fifteen.

Q. What were these cattle valuable for?

A. For range cattle or for beef cattle or for both; I should say for both.

Q. Were all of them fit for beef cattle?

A. Cattle were in good condition that year. I think there was possibly a cow with calf might be a little off.

Q. Who made out that paper—this paper containing the list of these cattle about which you have been just questioned?

A. I didn't make that list. I made a list.

Q. That is, a copy?

A. The original list that I made out at Matthews' dictation and at the request of Mr. Matthews before Mr. Burke in Sterling, because I could write faster than he could—just to save time. I don't know who kept that list.

Q. I am talking about the original. Who made that out?

A. I made the original out at Mr. Matthews' dictation.

Q. You saw the one exhibited here yesterday?

A. Yes, sir.

Q. Was that in your handwriting?

A. Yes, sir.

Q. Can you approximate the number with any degree of accuracy—the number of dead cattle you saw down there during the months of July, August, and September? I ask for the number that you saw—about how many?

A. I should say four or five hundred head. There was a great many dead cattle.

231 Q. Will you give the names of some of the other cattlemen whose cattle died at that time of this disease?

A. Joseph Rhodes, J. J. Charris, George A. Hughes, J. H. Stimson, Riley Dodd. There is an innumerable list of them.

Q. A long list besides those you have named?

A. Yes, sir.

Q. Have you any idea about how many cattle belonged to each of these individuals, that died?

A. No; I haven't. I know—I don't know individually.

Objection by defendant.

The COURT: I think you have gone into that fully. The only purpose was to show that the disease spread.

Q. Did you ever have any conversation or talk with Mr. Brush in reference to this disease?

A. Yes, sir; several times in reference to this particular case and the disease altogether.

Q. About what time and where?

A. I think the first time that I asked Mr. Brush was in the meeting there at Sterling, either October 4th or 5th, of the losers.

Q. What meeting was that?

A. I think the county commissioners called the first meeting of the losers to meet in Sterling to take steps with a view of some kind

of a settlement with the Western Union Beef Company about this transaction; about bringing the cattle in there.

Q. Was that a meeting which was called or at which there was any talk of a compromise?

A. I think there was no particular talk of a compromise at that time. The fact is a great many of them, some of the losers, hadn't come in with their affidavits, etc., so we could not get to a full sentiment of the meeting.

Q. That was a meeting called by the county commissioners?

A. I think so. That is my recollection.

232 Q. Did you have any talk with Mr. Brush as to what this disease was or heard him say to other people?

Mr. BRYANT: I want to cross-examine him about the meeting.

Q. I will except the meeting for the present; at any other time or upon any other occasion.

Cross-examination:

Q. Were these conversations at meetings where you were talking about settling the losses?

A. In a general conversation in regard to the loss, and what manner of settlement, and what the county commissioners should do, and the damages. There was a great deal said that I cannot recollect. They were all talking, all excited, a good many.

Q. That is the first time the losers had gotten together?

A. The greater number had gotten together. Some of them hadn't come in. They could not.

Redirect examination:

Q. I will ask you if there was anything said in reference to compromising this case or not.

A. I don't know as it was particularly compromise. It was to settle in some manner if we could.

Q. Did anything pass at that time between you, or did anything pass at that time between you and Mr. Brush or anybody else, so far as you know, as to compromising these cases?

A. Not at that meeting; no, sir.

Mr. BRYANT: Was it to settle these claims?

Q. Was that in reference to bringing a suit or suits?

A. There was threats of bringing suits there that day.

Q. Did Mr. Brush appear there for the purpose, so far as you know, of making any compromise of this case?

A. Not that I know of.

233 Q. Didn't hear of it?

A. No, sir. In fact, I think Mr. Brush said he was not authorized to act there at that time without the co-operation of the stock company. I think that is Mr. Brush's remarks there at the meeting.

Q. What, if anything, did he say as to what this disease was?

Objection by defendant as incompetent, immaterial, and irrelevant.

Mr. BRYANT: Didn't Mr. Brush say whatever he said there was in the way of a settlement and compromise?

A. I don't recollect of anything of the kind.

(Mr. MARKHAM, resumed:)

Q. He did say he had no authority?

A. That is my recollection. He said he would have to co-operate with the company.

Mr. BRYANT: Before he could finally settle he would have to get the consent of the company?

A. Yes, sir; before he could settle.

(Mr. MARKHAM, resumed:)

Q. Did he make any offer of settlement?

A. Not there at that meeting.

Mr. BRYANT: No offers made to him?

A. There might have been some offers made to settle on this statutory rate by some of the parties; there was so many talking and assuming different ideas.

(Mr. MARKHAM:)

Q. A general discussion of the whole case?

A. Yes, sir; just to see what to do in the future. That was mainly the object of the meeting, to see what steps to take.

Q. I will ask you to state if Mr. Brush did say what this disease was.

A. Yes, sir.

Objection by defendant renewed.

234 The COURT: From the testimony of the witness I am unable to determine at this time whether the conversation you are inquiring about was when the parties were attempting to settle their differences or not. That is a question which will have to be determined when all the evidence is in. I want to say to you, gentlemen of the jury, in this connection, to bear in mind that if at the time it is claimed Mr. Brush made the statements they were made in a conversation with these other parties when they were trying to settle and adjust their differences, then any statement that he made is not to be considered against the defendant company. The law favors the compromise and adjustment of difficulties by parties, and protects them from anything that they may say in the course of an attempt to settle; but if he made any statement in regard to the matter when the parties were not attempting to settle, those are independent statements, and may be considered by you for what they are worth. That is the best I can do at this time.

Recross-examination:

Q. Didn't Mr. Brush say that whatever he stated would not be binding on the company; that he would have to see them; that he

only met there for the purpose of seeing if it could not be settled in some way, and that he would have to report to the company?

A. That is substantially what I said; that he had no authority; claimed that he would have to confer with the company before he could settle. That was my understanding of his remarks at the meeting, what I heard of them; probably I didn't hear all that was said.

The COURT: I will have to let the question go to the jury with the explanation I make.

235 Objection by defendant renewed as incompetent and irrelevant evidence, the testimony showing that the statements of Mr. Brush were made at a time when a settlement and compromise of the differences of the parties plaintiff and defendant were attempted to be made. Objection overruled.

Redirect examination.

(Mr. MARKHAM, renewed:)

Q. What did he say it was?

A. He said it was Texas fever. In answer to a direct inquiry that I made to him, under all existing circumstances, didn't he think it was Texas fever that his cattle gave to ours, he said he did; he was perfectly satisfied of it, but the responsibility lay with the State and not with his company; he said he was perfectly satisfied that their cattle gave the fever, and that it was Texas fever, and the responsibility didn't lay with them. That is his words in substance to me. I put the inquiry to him myself.

Q. Did you have any conversation with him or hear him express to anybody else after that what this disease was upon any other occasion?

A. I don't recollect that he did.

Q. Did you see or talk with Mr. Brush about this matter after that?

A. Yes, sir; upon two or three occasions.

Q. And from these two or three conversations you don't remember that he said what the disease was?

A. I think the subject of the disease was not brought up after that meeting.

Q. With reference to checking these cattle up, these dead ones, what system did you adopt?

A. Mr. Matthews seemed to be well versed where these cattle lay over the prairie; it seems he had been around before we checked up, and myself and Mr. Greenman were to go along and keep a duplicate check on each of them, and Mr. Matthews was to call us, and we were to go to the cattle together in each instance and
236 check up. One was not to check unless the other was there, got there, and then to go to the other one.

Q. Was this over a limited or extended prairie upon which you checked up these cattle?

A. It reached to Cedar creek, which is five miles below Hiff, ex-

tended to four or five miles below Crook when I was with them, and then in the places around the bluffs.

Q. About how many miles long would that make?

A. Be about twenty-five miles, the whole strip that we ran over.

Q. And about how wide?

A. I should say an average width of over four or five miles; places we got out to the springs farther than that, and other places we worked closer to the river.

Q. State whether or not many of or any — these dead cattle were found upon the lands of McPhee and Mullen.

A. Yes, sir; a majority were upon their land. In fact, the cattle that were ranged along the river would naturally be on their land.

Q. You mean the land that they own?

A. Yes, sir.

Q. Do you know where this herd of Texas cattle was at this time, about the 7th or 8th of September, 1891?

A. Weil, they were scattered down the river on both sides.

Q. Were they in the immediate neighborhood of where they were turned loose in the first instance—that is, in the neighborhood of Iliff?

A. I guess the bulk of them were, but you could hear from them a great many places over the country, clear to Phillips county and Sedgwick county.

Q. Do you know whether the Western Union Beef Company or Mr. Brush for that company up to that time had ever made any efforts to separate these Texas cattle from the other cattle in the neighborhood or to remove their Texas cattle from that neighborhood?

237 A. I know I didn't, because I was working with the Mullen and McPhee outfit nearly all the time.

Q. You know they didn't?

A. I know they didn't.

Q. That is, you know they didn't ever prior to the time that you counted these dead cattle?

A. Yes, sir.

Q. Do you know whether the Western Union Beef Company had cattle in that neighborhood just prior to the time that they shipped and unloaded these Texas cattle in the same place?

A. They had a few cattle in there, home ranch cattle, and a few scattered cattle on the north side of the river, in McPhee and Mullen's cattle; cattle they had missed in gathering.

Q. Do you know what disposition, if any, was made of these cattle that they had there before that time, whether or not they were removed from there, just before they brought up these Texas cattle?

Objection by defendant as incompetent, immaterial, and irrelevant.

A. Only from hearsay.

Q. You had no means, I suppose, of knowing how many of these

dead cattle that you found and upon which you could not distinguish the brand belonged to Mr. Mullen and McPhee?

A. Only by an average of the number of cattle that they owned in comparison with the other people around that country; that is the only way you could get at it; they would naturally be more, a greater extent of cattle—

Objection by defendant.

Q. Do you know about the number of cattle contained in each herd belonging to the people in that vicinity, or that region of country, approximately?

A. Approximately I do.

Q. Upon what basis? How many or what proportion of the dead cattle upon which you could not distinguish the mark
238 would you estimate belonged to Messrs. Mullen and McPhee?

Objection by defendant as incompetent, immaterial, and irrelevant, and calling for a conclusion of the witness, and conjectural.

The COURT: I think that is quite uncertain. They may not all have been exposed alike. The man with a small bunch of cattle may have had all of his exposed, and they have died, whilst these other men may not; and I do not think it has been shown how relatively the cattle belonging to different owners were exposed.

Q. I will ask the witness further. I will ask you to state if you know whether the cattle of the other stockmen, some of whom you have mentioned, were, so far as you know, exposed to these Texas cattle about the same as the cattle of McPhee and Mullen.

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

Q. These parties who had cattle directly upon McPhee and Mullen's range had about the same or an equal show of loss. Mr. Ford and one or two others near Iliff had a greater show of loss; owned a smaller lot of cattle than McPhee and Mullen or myself. Their cattle got upon the affected ground a great deal quicker, and in greater comparison their cattle died, what they had; some of them lost all they had.

Q. How, with reference to these others you mentioned? You mentioned a long list. Was their exposure greater or less?

A. Just about equal. They ran with McPhee and Mullen's cattle. I believe my per cent. or loss was just the same as theirs. My cattle was mixed with theirs; and so with these other parties running on the Mullen range.

239 Q. You mentioned Dodd and these other cattlemen in that immediate vicinity and their cattle was exposed. Can you call to mind any others besides those you did mention?

A. Yes, sir; there was the Trowell outfit, Johnson's cattle, and J. W. Ramsey, and there were several losers who were located above Mr. Brush's ranch and the other side of the river that lost very heavily. I don't know anything about how they were fixed in regard to taking care of their cattle. I know they lost very heavily

Q. Did you go through their range at this time or any time to see how many dead cattle were there?

A. We didn't go above Cedar creek in checking. We considered that we didn't have cattle enough to justify the expense of going above there. We always tried to keep them below.

Q. Then some of these that you mentioned, you say, were less exposed to the Texas cattle than some of the others?

A. Necessarily.

Q. Than McPhee and Mullen's cattle?

A. Yes, sir; I considered on that immediate range where McPhee and Mullen's cattle and mine and Ramsey and Mr. Rhodes, particularly with them, those cattle suffered the heaviest of any of the range, because it was the center of the infection; that they suffered the heaviest because they were in the center—the very center of the infection.

Objection by defendant to all this line of testimony as incompetent, immaterial, and irrelevant. Objection overruled.

Q. Have you any idea of how many of these cattle there was that you say were subjected to it in small bunches more than the cattle of McPhee and Mullen?

A. McPhee and Mullen had a majority of the cattle over all of us.

240 Q. I ask of those you say there was a few whose cattle were exposed more than Mullen and McPhee.

A. Very small bunches. I think Ford had sixty and Mr. Dodd had six or eight. There was the small outfits.

Q. Would three or four hundred cover the whole number of those that you say were exposed to it?

A. I think it would fully; I think three hundred would cover it fully.

Q. The other small herds in that neighborhood that were exposed to it were less exposed to it than the cattle of McPhee and Mullen, besides these three hundred?

A. I think so from the fact that some of them had them in pasture or had put them in pasture after they found out the infection was out. The idea I meant to convey is this, that these cattle that were left right with McPhee and Mullen's, right in this center of the infection, suffered all alike, although the McPhee and Mullen outfit had a great majority of the cattle that was in this direct district. Of course, the outside district I don't know anything about or much about it. Cattle were lost forty or fifty miles from there that I heard of.

Q. Can you make an estimate of the number of head of cattle, from your knowledge of the cattle in that neighborhood, which were equally exposed to this disease besides the cattle of Mullen and McPhee—how many head of cattle were equally exposed to the disease and would be liable to take it and died as theirs?

Objection by defendant as incompetent, immaterial, and irrelevant. Objection overruled.

Q. About eight hundred or a thousand head.

Q. From eight hundred to a thousand head, and McPhee and Mullen had at that time, you say, near four thousand?

A. I should say four thousand head of cattle.

241 Q. I will ask you the question if you would, from all these facts, estimate about what portion of those dead cattle that could not be distinguished on account of the brand being gone were cattle that belonged to Mullen and McPhee.

Objection by defendant, as sufficient foundation has not been laid and the witness shows no knowledge on his part to enable him to arrive at a correct result.

The COURT: He has stated that they have owned about four-fifths of those that were equally exposed.

A. That is the idea I intended to convey.

Q. Now, I ask you about what proportion, then, of the dead cattle that he could not recognize the brand belonged to Mullen and McPhee.

The COURT: I think the jury just as the witness to make a deduction, and in that case it is not proper for a witness to do it.

To which ruling of the court the plaintiffs duly excepted.

(Witness stands aside for Dr. Lamb, and, upon being recalled, his direct examination continued as follows:)

Q. Do you recollect the condition of the Platte river; whether the cattle were down there during the summer months of 1891?

A. Yes, sir; it was moderately full; the channels were running nothing like what we call an overflow or anything of that sort; just a moderate flow of water.

Q. At what season of the year was that, during what months, when you speak of it being moderately full?

A. Well, I would say during June and July. In August and September the river was a good deal lower.

Q. What was the condition in August and September?

212 A. Well, it had fallen. It was muddy and full in June and July and in August and September it had fallen and gotten clear.

Q. How was the cattle crossing the river during these months; any trouble in crossing?

A. No; I don't think they had any trouble in crossing.

Q. So far as you know, were the cattle in the habit of crossing the Platte during these months?

A. Yes, sir.

Q. During what period of that time did they cross most, when it was high or low?

A. They would cross more when the river was low; when it was low water; still they crossed at all times.

Q. Was the water so high during any portion of this time that it prevented these cattle from crossing?

A. No, sir.

Q. I mean by the question was it so high that it prevented them from crossing voluntarily without being driven across?

A. No, sir; from the fact that they did cross.

Q. They crossed voluntarily?

A. They did cross.

Cross-examination:

Q. You didn't see the Western Union Beef Company unloading there?

A. No, sir.

Q. The first you knew about it you saw bunch looked like two or three thousand head on the south side of the river?

A. That is the first I knew of my own knowledge; the first I heard was hearsay.

Q. This bunch that you saw over there looked like it had two or three thousand head of cattle?

A. In it.

Q. That was long after the 19th of June, or along the 19th of June somewhere?

A. Yes, sir.

Q. What was the condition of the river at that time?

A. It had considerable water in it, but not enough to prevent crossing voluntarily or otherwise.

Q. Tell us what you mean by considerable water.

243 A. The channels were running full—that is, sand bars between in some places; the water would be deeper and shallower.

Q. Would cattle have to swim in places across these channels?

A. Not large cattle; the calves would probably have to swim in some places.

Q. In some places it would be deeper than others, in holes?

A. Yes, sir; there might have been a channel; that probably for a foot might have to swim a yearling or two-year-old. I don't know; sometimes the river does cut holes in the sand in places.

Q. The river was full that year more than ordinarily?

A. A trifle more so, probably.

Q. The water was muddy as soon as it was up a little?

A. Nothing like it was this year; it was a little fuller than usual.

Q. You say you saw a day herder go down several times and turn these back?

A. I didn't say several times; my recollection is that I saw him two or three times, two day herders, and turn the head of the cattle down from the sand hill back up the river about half a mile to the ranch, and then go back, and then go back to the ranch.

Q. Turn them up the bluffs?

A. No, sir; just up the river, on the bottom. These cattle there—there, that is the Brush camp (indicating on map)—turned right down here, these Lone Trees, somewhere in about there on that section line very nearly. These sand bluffs commence in here and go

into the river, making a very high bluff. These herders made a circuit around this way from the bluffs a little way. I could see them on the top of the bluffs, and turned the head of the cattle back somewhere into this country and then go up the road on the trail.

I could see for two or three miles and go back to the ranch.

244 Q. You saw two herders?

A. Yes, sir; and some days I saw one.

Q. How many days did that keep up?

A. I don't recollect seeing it over three or four days.

Q. And there were two herders at the Brush camp during that time?

A. There must have been. I saw two men, one or two days—I think, I saw only one man. I presume—it is only presumption that they were Brush's herders. I thought they were from the fact that they were moving cattle up the river, and I don't know who else was doing it.

Q. They went back to his ranch?

A. I didn't say that. I could not see the ranch. They took the trail that runs on the south side, that goes by Brush's ranch, after turning the cattle back—about half a mile, sometimes three-quarters, back up the river.

Q. Then, did you notice more than one on your side of the river from that time that you speak about turning out in your pasture?

A. That is the first one that I noticed. Right after I had heard they had turned the cattle loose, in a few days, I saw several go around there.

Q. What do you call several?

A. I saw twenty-five head around Iliff.

Q. The last of August, I believe, you said they commenced; the river was down. Was it the first of August that the river went down?

A. The river, I think, to the best of my recollection, commenced falling somewhere near the first of August—falling gradually—going down.

Q. After it got down, so they could cross without any trouble, they commenced coming over?

A. Yes, sir; that is my recollection.

Q. That would be what time, from the first to the fifteenth?

A. Yes, sir; somewhere along there.

245 Q. Now, you commenced counting these cattle about the 7th or 8th of September; how many days were you doing this?

A. I could not say exactly; it must have taken a week or more to have gone over that hill.

Q. Put in a full week?

A. Yes, sir.

Q. All the carcasses that you saw were much swollen, you say?

A. No; I didn't say that the carcasses were much swollen; where an animal died the night before—where I thought it gave evidence of its having died the night before—it was not very much swollen.

Q. How many of these did you see? Did you say you saw only — died the day before?

A. I could only make an estimate.

Q. Give us your best judgment.

A. Probably we found one out of ten.

Q. One-tenth of them?

A. One-tenth of them that had probably died in a day or two, so far as I could judge.

Q. These were not swollen; but the bulk of them, nine-tenths, looked as though they had been dead some time, and one-fourth of them decomposed?

A. I should say that per cent. of them.

Q. And been dead two or three weeks, some of them?

A. They probably had. I could not say. It was very warm weather, and they went to pieces quick.

Q. You identified as belonging to the plaintiff in this suit eighty-three head?

A. Yes, sir.

Q. And you went to Sterling along February, 1892, to make this affidavit?

A. Yes, sir; I made an affidavit.

Q. You and Mr. Matthews?

A. February 16th, 1892; I think me and Mr. Matthews.

Q. The 16th day of February?

A. I forget the date.

Q. The 16th of February; how did you come to go there?

A. In order to get the services of a notary public.

246 Q. Just you and Mr. Matthews went?

A. I don't just remember; I do not recollect whether any one else was there that day with us or not; I can't remember.

Q. Was he with you all the time that you were counting up these cattle?

A. Practically, he was with us all the time.

Q. What do you mean by practically?

A. When we were going around he was in the immediate vicinity where we could have called upon him; we could have done so. Mr. Matthews didn't check the cattle—that is, while I was with Mr. Greenman.

Q. He didn't check?

A. That eighty-three head; the understanding was that myself and Mr. Greenman were to check together; Mr. Matthews was to assist and run around and find these cattle. It was quite an undertaking to find them; go all over the range; we would scatter, and when I found one I would call Mr. Greenman, he would identify it, and we would agree upon the brand and put it down upon the record. The understanding was that we were to take nothing except the other man checked it.

Q. Did you put any mark on there so you know you had checked it without checking it the second time?

A. That was not necessary.

Q. You would know by the locality?

A. Yes, sir.

Q. You and Mr. Greenman were the ones that took the eighty-three head?

A. Yes, sir; this is all I made affidavit to, eighty-three head. I checked with Mr. Greenman.

Q. When you went into Mr. Burke, at Sterling, you stated what you had found and Mr. Matthews said what he found, and then the affidavit was drawn up?

A. Yes, sir; the whole was done there at that time,

Q. Did Mr. Matthews see all that you included in your eighty-three head when he would be away sometimes?

247 A. Mr. Matthews, I presume, saw nearly every one of the cattle, because it is a very little strip of country, and when we went right up to an animal he came up; in fact, it would take us some little time to check these cattle; we would have to turn them over and put a rope on their horns or heels and swing them around and get the brand, and by that time he would find another and we would go up. By that I am convinced that Mr. Matthews saw all these cattle that I checked and knew where they were found; he found the bulls of them himself; he knew where a great many of them were before we started.

Q. Did you have anything to do with his having found these other thirty-three head?

A. No, sir.

Q. You don't know anything about that?

A. No, sir; I went home and then afterwards came back and assisted to clean the range wherever I could spare the time. When I would see them working in my part or wanted me or sent for me, and I would get a horse and go and help them to clean the range.

Q. Do you remember what occurred when you and Mr. Matthews went in to make these affidavits?

A. No, sir; only a commonplace description of what took place in regard to what was best to do in regard to these affidavits, when the lawyer, who was a notary public—the notary public he was also an attorney—if I remember rightly, he suggested that I, as Mr. Greenman was not there—as I did the checking, that I make the affidavit in regard to these eighty-three head, and as Matthews helped to put down the other thirty-three, for him to make the affidavit. I wrote the affidavit just merely to save time. I was a fast writer.

Q. These three papers are in your handwriting?

A. Yes, sir; they are in my handwriting.

248 Q. The one in which you say you put down the values, you say you put it down under the statute?

A. Yes, sir; as near as I could get at it from the statute.

Q. Took the statute and went by that?

A. Yes, sir.

Q. Did the statute have any valuation for bulls?

A. Yes, sir; I think it has. I don't recollect that specially. As far as we could go by the statute we went. If we didn't we placed the valuation as near as we thought was right ourselves.

Q. If the statute has no valuation for bulls, then you put down what you thought was right?

A. Yes, sir.

Q. And you put them at thirty-five dollars?

A. I disremember.

Q. If you put them in at thirty-five dollars, is that what you thought was right at that time?

A. I went a good deal on Mr. Matthews' opinion in regard to the matter in managing it.

Q. Mr. Matthews said he never heard of that.

A. I can't help that. He was there at the time the matter was discussed—right there. My impression is there was a price fixed in the bill for bulls. I don't recollect, but my impression is that there is a price fixed on all cattle—on bulls as well as any others, for the bulls are just as likely to be killed on the railroad as any other—but I haven't looked at the statutes from that day to this.

Q. Do you know what statute you used?

A. No, sir.

Q. Was it a large book?

A. I think it was like that, but I don't remember the year, but it is the general statutes of the State of Colorado.

Q. If there were no bulls mentioned in the statute you put down what you regarded just a reasonable value?

A. The presumption is we would, of course.

Q. And you thought they were worth—

A. That would be thirty-five dollars.

249 Q. Do you think, now, that they were worth forty dollars?

A. Well, yes, sir; I say forty dollars. I don't recollect what the valuation was we put on them at all.

Q. Do you think this was the statute—the general statutes?

A. I would not say. I was assisted by the attorney, and the fact is he looked up the matter; I can't recollect. We took the statutes subsequent to the action of the committee that Mr. Brush was a member of—that made these valuations for these statutes that went into this law.

Q. You took his valuation?

A. No, sir; we took his statutes. He was a member of the commission who made them, and we took the ones that were made after that.

Q. Didn't the legislature pass it?

A. The proper authorities passed it; I suppose they did.

Q. I guess this is the one that was used.

A. 'Ninety-one statutes.

Q. You think, now, that the bulls were worth forty dollars?

A. Well, there is very little discrepancy between thirty-five and forty dollars. I saw from thirty-five to forty dollars.

Q. The cows were worth eighteen to twenty dollars?

A. Yes, sir.

Q. And the heifers fifteen to eighteen?

A. What age heifers? Thirteen to fifteen, I said.

Q. You say two-year-old heifers, thirteen to fifteen?

A. I think you will find in the stenographer's report there that is of two-year-old heifers.

Q. You have a claim of your own against the Western Union Beef Company?

A. Yes, sir; some of my cattle were destroyed.

Redirect examination:

Q. You spoke, in answer to Mr. Bryant's cross-examination or a question on cross-examination, one-tenth of them was; something of that kind; I didn't get it clearly—one-tenth appeared
250-293 to have died the day before and the balance of them three or four weeks before. Was that the way?

A. I intended to convey this idea: that these cattle that were lying dead had died at different times, and probably one-tenth of them had died in the two days or one day of the time we were checking. They died all the time before that time.

Q. And the others died at different times long before that?

— I suppose two or three weeks back of that period, for some of them were in such a state of decomposition as to be unable to identify them.

Q. You did not intend to fix the time about when these other nine-tenths died?

A. No, sir; it is impossible to tell that.

* * * * *

294 (TUESDAY, September 18th, 1894.)

Plaintiffs read in evidence without objection letter from J. L. Brush to the plaintiffs, which is marked Exhibit "B," and is in words and figures following, to wit:

Colorado department of the Western Union Beef Company, J. L. Brush, manager.

GREELEY, COLORADO, Sept. 7th, 1891.

J. K. Mullen, L. D. McPhee, Denver, Colo.

DEAR SIR: Yours of Sept. 5th is at hand. On or about the first day of June I received about 2,800 head of cattle with a clean bill of health inside our quarantine line and branded them at Iliff at the stock yards and turned them loose on the south side of
295 the Platte river with our cattle. I did not cross over or turn any loose on the north side, to my knowledge, although I have no doubt but that some of the same cattle did recross the Platte river, as all our cattle do during the dry weather. On my return from Texas last Saturday I found that the veterinary surgeon had decided that there was some Texas fever down there. It seems almost impossible that the cattle that I turned loose should have given the fever at this late day, as it was 60 or 70 days after the cattle were exposed before there were any signs of fever. All authorities agree that cattle will be infected with the disease 14 to 28 days after being exposed to it. I turned these cattle loose with my own thoroughbred cattle on the south side of the river, believ-

ing at the time that they were as healthy as any of our own cattle, but am sorry to say that some of them have died with the disease. Two weeks ago we gathered all the cattle from your range and found, I think, some fifty to one hundred head, which were all crossed back to our side.

I am going down tomorrow, and will look the matter over and write you more fully.

Yours truly,
(Signed)

J. L. BRUSH."

Plaintiffs offer in evidence letters and statements of a commission house in Omaha, directed to plaintiffs, regarding the sale of certain cattle belonging to the plaintiffs.

Objection by defendant as incompetent, immaterial, and irrelevant, not being the best evidence, and no evidence of the market value of said cattle.

296 Objection sustained; to which ruling of the court the plaintiffs duly excepted.

The COURT: I do not think this is the kind of report that is competent. I know there are market reports generally that are reported in newspapers and trade journals that are competent evidence, because they are open to the public. These letters and statements are private. It is competent for Mr. Mullen to base his judgment as to values upon these, but I do not think the reports themselves are competent.

Plaintiff MULLEN, being recalled for recross-examination, testified as follows:

Q. Whose writing is that (showing letter)?

A. This is my writing.

Q. That is a letter in which you made your formal claim against the defendant company?

A. No, sir—yes, sir; it is my writing.

Q. This is your writing on the 20th of February, 1892?

A. I didn't notice the date.

Q. It is dated that day, and in which you claim you lost only one hundred and sixteen head of cattle, and only worth \$2,388. Is that true?

A. No, sir.

The COURT: The letter speaks for itself, and he acknowledges the genuineness of it.

Q. Do you want to explain that letter?

Defendant offers in evidence said letter, which is marked Exhibit "1," to be taken in connection with the cross-examination of this witness.

Mr. MARKHAM: Let him explain the letter.
Offer withdrawn.

297 WILLIAM J. POWELL, being recalled by the defendant for recross-examination, testified as follows:

Q. Is that your letter (showing letter)?

MR. MARKHAM: This is hardly fair, unless the counsel proposes to offer these letters now. He can have them identified now.

Q. Mr. Powell is going away and I will offer this now, if you wish.

MR. MARKHAM: Are you going away?

A. I want to go unless it is absolutely necessary for me to stay here.

MR. BRYANT: We will offer this letter now.

WITNESS: Yes, sir; I wrote that letter. I forget the date. It is my handwriting.

Q. Is this the date you made the affidavit, 16th or 17th or February?

A. Yes, sir.

Said letter offered in evidence by defendant, same being marked Exhibit "2."

Redirect examination:

Q. Any explanation to make in connection with that letter?

A. No, sir; I don't want to explain further; just what the letter implies.

Q. Is there anything more in connection with that letter than the letter states itself?

A. I cannot recollect anything now, it has been so long ago.

Said Exhibit "2" thereupon read in evidence by defendant, which is in the words and figures following, to wit:

"S. A. Burke, attorney-at-law,

STERLING, COLO., Febr'y 10, 1892.

Hon. J. L. Brush, Greeley, Colo.

298-323 DEAR SIR: Mr. Matthews & myself today made out McPhee & Mullen's claim and sent to them to deliver to Judge Symes. I owe you an apology for not answering your letter sooner, but was very busy at ranch & did not get to post-office. These 2 cows I make claim for I knew nothing of until last week. Mr. Greenman was between ranch & Sidney keeping back cattle & did not report this ~~cow~~ to me & Mr. Matthews forgot it. ~~I~~ went personally to the animal reported by Greenland & found it correct. Snow pretty deep, but stock doing a great deal better than this time last year down with us.

Yours truly,

(Signed)

W. J. POWELL."

* * * * *

324 Plaintiffs rest.

Thereupon the defendant moves the court to grant a nonsuit in this cause upon the following grounds, to wit:

325 1. The plaintiffs have not proved the existence of any State quarantine regulations or proved any violation of any if any existed.

2. The plaintiffs have not proved that the defendant in shipping the Texas cattle referred to in the testimony violated any State quarantine statute or any other State statute.

3. Plaintiffs have not proved any violation of the national quarantine regulations, but, on the contrary, have shown that the defendant complied with the national quarantine regulations.

4. Plaintiffs have not shown the conditions mentioned in the act of Congress to have arisen under which the national quarantine regulations would go into effect.

5. The act of Congress under which the regulations of the national board of health were made is unconstitutional and void, because it is not authorized by any provision of the Federal Constitution.

6. The plaintiffs have not shown any liability by any competent evidence of the defendant to the plaintiffs under any of the rules of common law, for the reason that they have shown no knowledge on the part of the defendant that these cattle were infected with any disease, and have shown no circumstance from which knowledge could be inferred.

7. There is a variance between the allegations of the complaint and the proof, the allegations of the complaint alleging that these cattle were infected with Texas fever, while the proof shows that the cattle that were brought from Texas were absolutely free from any disease whatever and had never had any when they started or after they came to Colorado.

326-361 8. There is no evidence to show any connection between the cattle that were brought up and the breaking out of the alleged disease among the Texas cattle, or, in other words, there is no evidence showing that the defendant's cattle imparted any disease to the cattle belonging to the plaintiffs.

9. Plaintiffs have not proven by competent evidence any damages resulting to them by reason of any negligent act of the defendant.

And thereupon, after due argument of said motion, the same is by the court denied.

Thereupon, to sustain the issues in its behalf, the defendant introduced the following evidence:

362 J. L. BRUSH, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination:

Q. What is your full name?

A. Jared L. Brush.

Q. Where do you reside?

A. Greeley, Colorado, Weld county.

Q. How long have you lived in Colorado?

A. Since 1859.

Q. What has been your business?

A. Since 1864 I have been—1863, '2 and '3, I have been—connected largely in the stock business.

Q. In Colorado?

A. Yes, sir; Colorado, latterly; some in Texas.

Q. Have you had any cattle all along the Platte river?

A. Yes, sir.

Q. Since when?

A. Since 1865.

Q. Whereabouts is your range along the river?

A. First, there is about twenty miles—about thirty miles—below, on the Platte river, below Greeley, and for some three or four years—then across on the south side, and had a range on what is called —, three miles below Green city, which is about forty miles below Greeley on the south side. In about 1871 I went down to what is now known as the J. B. ranch, about twelve miles or thirteen, I think; it was 1871; I won't be sure; maybe 1872. I went down and located a cattle range down on what is called the J. B. ranch, now opposite where it now stands.

Q. And have you had that range?

A. Since I have located there then, some eight or ten years afterwards, I bought what was called the One Hundred cattle and ranch. It was located at what is usually known as Old Julesburg. The ranch consisted of property and improvements on both sides of the river.

Q. How far from Iliff?

A. It is about forty-five miles—probably forty or forty-five—below the town of Iliff. I was the only person for seven or eight years upon the south side of the river in what is known as the Old 22 ranch, which is about twenty miles above Sterling, until what is called the Buskirk outfit came in and located at Julesburg, on the south side, and afterwards I bought that out.

Q. Do you remember when Mullen and McPhee came in on their range?

A. I could not say exactly the date.

Q. Had you been established there before that time?

A. Yes, sir; six or eight years. I used to keep my cattle in the winter time on the south side. I established that camp.

Q. You say you had been there some time before they came in?

A. Yes, sir; I should say, if my recollection serves me right, the only cattlemen when I went there was the Iliff range, which was owned by Iliff, and Mr. James Moore and myself and maybe one or two other little men came in.

Q. Where was your range at the time they came?

A. Up to 1891 I always claimed—

Objection by plaintiffs.

Q. Where did your cattle run?

Objection by plaintiffs.

Q. Where was your ranch and range?

A. I had one ranch. The main ranch was at the J. B. ranch, close to Iliff.

Q. Where was the range?

A. One winter I wintered on what we used to call the old James Moore range, which I don't know, but I think it is pretty near in the center of McPhee and Mullen's range at the present time.

Q. That was before they came in?

A. Yes, sir; I know my cattle ranged all winter, two or three winters, at Cottonwood, which is one of the McPhee ranges
364 now. I kept my cattle during the early days there on the south side in the winter time and crossed them over in the summer time, and crossed them over across the river in the winter time.

Q. And kept them on the north side?

A. Done that frequently.

Q. When they came in there where was your range at that time?

A. It was all along the river; mostly on the south side from Julesburg.

Q. The main ranch was where?

A. Right where it is now.

Q. In 1891 where was your main ranch?

A. Right where it is now; close to Iliff.

Q. How long has that been your main ranch?

A. I am not positive whether it was 1871 or '72 I went down there. It was about that time. I draw my conclusions from that—from the time I went to Greeley to live.

Q. Why was it called the J. B. ranch?

A. That was the brand—my personal brand—when I went into cattle.

Q. When was that?

A. You are speaking about 1871?

Objection by plaintiffs.

Q. Why was it called the J. B. ranch?

A. That was my brand at that time; that was my initials.

Q. In 1891 did the Western Union Beef Company succeed to your claim?

A. The Western Union Beef Company bought out all the interest in the cattle and the range that I had and that Governor Routt had.

Q. What connection did you have with that company?

A. I was manager at that time.

Q. In 1891?

A. Yes, sir.

Q. What range did they have at that time near Iliff?

A. The range at that time had been condensed by settlement a good deal. The Western Union Beef Company held the One Hun-

365 dred ranch, but afterwards settlers came in, and we had to move up the river. The Western Union Beef Company owns, I think, if I mistake not, one hundred and sixty acres of land below Mr. Rice's. It was the first they owned. They may have leased it to B. F. Johnson, trustee; eighty acres. I think that Mr. Rice informed me he had fenced in his pasture. I don't know whether that is true or not. I believe it is. Then, in 1891, we had leased there from three miles above Mr. Rice's up to what is called the Dobies, which is about ten miles. We had the river front all leased, except one or two eighty acres—except what was owned—for eight or ten miles.

Q. Do you own any land on that side of the river also?

A. Yes; I think about sixteen hundred acres, but not all on the river. We owned a great many water holes away from the river.

Q. On the south side?

A. Yes, sir. I think that I paid taxes here for 1,640 acres of land for the Western Union Beef Company that — were entitled to. It is not all in one county; some in Phillips.

Q. In June, 1891, the Western Union Beef Company had some cattle in Kimble county, Texas?

A. They had.

Q. Do you know how long these cattle had been there?

A. Not from my own personal knowledge, except I was there in the winter of January and February. I think it was in January that I was on the range in Kimble county; went over the range. We had a pasture there. We own fifty thousand acres of land, and we had leased from the State of Texas about fifty more, which is all included. I looked over the range then, and we had about six thousand or eight thousand head of cattle.

Q. That is in Kimble county?

A. I was also manager at that time of all the cattle in Texas.

Q. The Western Union Beef Company own the cattle?

366 A. They own these cattle and own this range.

Q. That was all in Kimble county, was it?

A. Yes, sir.

Q. Do you know about shipping some cattle from Kimble county?

A. I instructed at that time to drive all young steers to Quanah, and I was at Quanah when the cattle arrived there. I superintended the shipping of the same; didn't come through with the cattle, but I superintended the loading of the cattle; was at Iliff when these two herds was unloaded. That is in 1891.

Q. You were at the range and pasture when they started?

A. Yes, sir.

Q. And then you were at Quanah when they got there?

A. Yes, sir.

Q. And superintended putting them on the cars?

A. I did.

Q. And then was at Iliff when they arrived?

A. Yes, sir; I was there when the last herd was received.

Q. Do you know what was done at Quanah before they were shipped? Were there any regulations or rules to be complied with?

A. Yes, sir.

Q. Was there any affidavit made out?

Q. Yes, sir; affidavits, I think, were made out before we left Kimble county, I think. I met the inspector there, Mr. Andrews. I don't know—I forget—his initials.

Q. Was it Mr. D. McAndrews?

A. I think that is the name.

Q. What position did he hold?

A. He was inspector for Colorado, Montana, and Wyoming; more particularly for Colorado.

Q. When you saw the inspector. Tell us what you mean by that.

A. He was instructed by the sanitary board——

Q. Was he employed by the board?

367 Mr. KINGSLEY: What were these written instructions of the sanitary board? Were you present when he received these instructions?

A. I think I gave them to him.

Q. What connection did you have with the sanitary board?

A. I was a member of it in April, 1891.

Q. Then you were a member of it at the time?

A. I think I was president of the sanitary board. Mr. Metcalf was secretary.

Q. And what position did Mr. McAndrews hold with reference to the board?

A. We paid him so much money——

Objection by plaintiffs.

Q. What position did he occupy?

A. He was inspector; he inspected all cattle.

Q. What were his duties as inspector?

A. I was just going to tell you. He was inspector of cattle; more particularly to inspect the papers and to find out whether these cattle were cattle that was originally started north or south of the quarantine regulation lines. Our rules and regulations provided that we would have to——

Objection by plaintiffs as not best evidence.

Q. Did you see Mr. McAndrews at Quanah?

A. I did.

Q. And do you know what he did with reference to this herd of cattle?

A. I went to the herd of cattle with him and he examined it, examined the paper, examined my affidavits, and he gave us a clean bill of health.

Q. And then you shipped them?

A. Yes, sir; I shipped them.

Q. I will ask you to look at that and see if that is the affidavit that is made out as required.

A. Yes, sir; that is the affidavit.

Q. What were these rules and regulations on the back of it?

A. That is the rules and regulations of the sanitary board in Colorado, Montana, and Wyoming.

368 Q. These relate to this identical herd of cattle, does it?
A. Yes, sir; that is the herd of cattle that was shipped from Kimble in '91 and unloaded at Iliff.

Affidavit marked Exhibit 3 and offered in evidence by defendant.

Objection by plaintiffs to said exhibit for the reason that no authority has been shown for the same; and, further, that said rules and regulations on said affidavit are subservient to the rules and regulations of the Agricultural Department already received in evidence.

Objection overruled; to which ruling of the court the plaintiffs duly excepted.

Thereupon said exhibit is read in evidence, which is in the words and figures following, to wit:

"Affidavit of Two Responsible Parties.

We, E. Cloudt and N. H. Condor, citizens of the county of Kimble, State of Texas, do hereby certify that we know twenty-eight hundred head of cattle branded L. C. X **ALCL** and owned by Western Union Beef Company, whose post-office address is Junction city, county of Kimble, State of Texas, to have been held during the ninety days preceding this date in the county of Kimble, State of Texas. The said cattle are about to be shipped from Quanah to Iliff, Colorado, consigned by J. L. Brush

to " "
E. CLOUDT.
N. H. CONDER.

Subscribed and sworn to before me this 11th day of May.

W. G. BOYLE,
Co. Clerk, Kimble Co., Texas."

369

Certificate of Clerk.

I hereby certify that the parties whose signatures appear to the foregoing affidavit are personally known to me to be reputable and responsible citizens.

W. G. BOYLE,
Clerk of Kimble Co., Texas.

Dated Kimble, Texas, 11th May, 1891.

(On the back of said affidavit is printed the following:)

Colorado, Wyoming, and Montana Quarantine Regulations for 1891.

The following regulations will govern the admission of southern cattle into Colorado, Wyoming, and Montana during the year 1891, to wit:

First. All cattle coming in whole or in part from south of the thirty-sixth parallel of north latitude between the last day of March and the first day of November must show by affidavit of two responsible parties, whose reliability shall be certified to by the clerk of a county or of a district court:

(a.) Name and post-office address of the owner, consignor, and consignee.

(b.) The county or counties in which the said cattle have been held during the preceding ninety (90) days and the total number demanding entry.

Second. Each train-load (or herd, if driven) must be accompanied by a certified copy of the original affidavit.

Third. Unless satisfactory proof is presented to the State veterinarians of Colorado, Wyoming, and Montana or to their authorized deputies that cattle have been at least ninety (90) days north of the thirty-sixth parallel of north latitude or west of a line drawn
370 from a point where the thirty-sixth parallel of north latitude crosses the Arkansas river, southwest to the northeast corner of Wilbarger county, Texas; thence south along the east lines of Wilbarger, Baylor, Throckmorton, and Shackelford counties; then west along the south line of Shackelford county; thence south along the east line of Taylor, Runnels, Concho, Menard, and Kimble counties; thence west along the south lines of Kimble, Sutton, and Crockett counties; thence south along the east line of Pecos county to the Rio Grande river, they will be deemed liable to convey Texas or splenic fever, and will be held in quarantine at the risk and expense of the owner for not more than ninety (90) days.

Fourth. All southern cattle, to be moved by rail and destined for Colorado, Wyoming, and Montana, will be inspected before they are loaded at the original point of shipment, and if they are found to be free from disease and all of these regulations have been complied with a certificate will be issued, entitling them to the freedom of these States.

Fifth. Any southern cattle found at any point in Colorado, Wyoming, or Montana not branded as set forth in the original affidavit, or that have not complied with these regulations, will be held in quarantine, at the risk and expense of the owner, until they are deemed safe to mingle with native northern cattle.

Sixth. Cattle coming by rail will be inspected at the usual place, near Point of Rocks.

Seventh. To defray the expenses of inspection a fee of one and one-half cents per head will be charged, payable before a certificate is issued.

Blank affidavits will be furnished upon application to either of the undersigned:

CHAS. G. LAMB,
State Veterinarian of Colorado.
A. A. HOLCOMBE,
State Veterinarian of Wyoming.
HERBERT HOLLOWAY, V. S.,
State Veterinarian of Montana.

(Endorsed:) 2,793 head of cattle. The cattle described within have been inspected by me this 14 day of May, 1891. Daniel McAndrew, inspector.

Q. I understand you to say that you were president of the board at that time?

A. What time was that issued?

Q. The affidavit is dated May 11th.

A. Yes, sir. I think it was about the same time in April I was upon the board appointed president by Governor Routt. I don't remember the date.

Q. A third division is here, "Unless satisfactory proof is presented," etc., that these cattle were within a certain district, and then the district is described, running west along the south line of Shackelford county and south along the east line of Taylor, Runnels, Concho, Menard, and thence west along the south line of Kimble county, etc. Were these counties within that district?

A. Kimble county was north of the Colorado quarantine line.

Q. So that cattle were free to be shipped from Kimble county into Colorado?

A. No objection to coming from Kimble county, so far as Colorado was concerned. I found that the case when I went on the board. Those rules and regulations was issued before I was a member of the board.

Q. Were these rules and regulations made before you became a member of the board?

A. Yes, sir.

Q. Do you know when you became a member of the board?

A. I think some time in April.

Q. What time?

A. I could not tell the date.

372 Q. You found these rules and regulations in force at that time?

A. Yes, sir; Mr. Ernest and Mr. Metcalf and Mr. Stubbs, of Colo. Springs, was on the board.

Q. And these rules adopted by them?

A. Yes, sir; what date I don't know.

Q. You say Mr. McAndrews was located at Quanah for the purpose of seeing that these regulations were complied with?

A. Quanah was his headquarters, although his duties was to work along the line of the Fort Worth road; he took in several counties shipping points. We employed him at that Government point. We had appointed—I think he was appointed deputy under Mr. Lamb.

Q. He was a deputy?

A. I think he was.

Q. Deputy State veterinarian?

A. At least we appointed him an inspector.

Q. Had Mr. Lamb been employed as State veterinarian when you went on the board or was he on before?

A. He was on before.

Q. Do you know how long he had been on ?

A. He had — on two or three or four years, but he went off when I did.

Q. These rules were adopted, as I understand, by the joint board of Colorado, Wyoming, and Montana ?

A. That is my understanding.

Q. And Mr. McAndrews gave you what you call a clean bill of health ?

A. Yes, sir.

Objection by plaintiffs as not the best evidence.

Q. Was it in writing ?

A. I think so.

Objection renewed by plaintiffs, and motion to strike out answer.

Q. Do you know where that is ?

A. It ought to be in the secretary's office.

Q. Was it in writing, do you know ?

373 Mr. KINGSLEY : The law requires it to be in writing.

A. He gave us.

The COURT :

Q. What secretary's office do you mean ?

A. Mr. Metcalf ; I think Mr. Bryant has got it there. He gave us a bill of health. I secured it myself, and the bill of health was given, and the law provided that each train must have a bill of health. I gave each bill of health to the man who had charge of the cattle. The railroad always takes these bills of health to protect themselves. They are compelled as well as I am not to have the cattle leave the State. I made them out, and each train had a bill of health.

Mr. KINGSLEY : This is, understand—that this is not in evidence.

The COURT : He is stating they are——

WITNESS :

A. It would be impossible for me, I presume, to get this bill of health or these health bills unless I could get them from the railroad. I did get a bill of health or got five bills of health and gave them to each man who had charge of each train, as I was compelled to do by the law.

Q. Then you went to Iliff ?

A. I did.

Q. And you were there when the first train-load arrived ?

A. I was not.

Q. When did you get there in reference to these trains ?

A. I think all trains had got there when I got there. I think I went down on the pasture. They were not all branded at the time.

Q. Did you see where the cattle were when you got there ?

A. There was some of them in the corral.

Q. In what corral ?

A. At Iliff.

Q. In the stock yard?

374 A. Yes, sir; I think so; some of them were there; I think there had been some in about two days before I shipped from Quanah; I shipped the cattle; I think I shipped the cattle in one day, but some of them got through ahead of the washouts and others delayed a day or two on the washouts, so that the cattle was two or three days arriving at Iliff, and the cattle were all branded and put across the river.

Q. Where were your cattle that had already arrived there? Where were they?

A. They were across the river, those that were turned out of the corral.

Q. Across the river?

A. Yes, sir.

Q. Did you notice any on the north side?

A. No, sir; my instructions were to put them all across the river.

Q. Did you see what was done with those in the corral?

A. I saw some of them put across the river; helped to—

Q. Did you assist in doing it yourself?

A. I did.

Q. Did you see all of them on the south side of the river?

A. I could not say that I saw them all. I saw a good many cattle there. I could not say I saw them all.

Q. Did you see any left on the north side?

A. I didn't.

Q. What was the condition of the river at that time?

A. Very high, so much so that I was afraid to cross, but did cross and got wet. I had as large a horse as there was, but I don't think it quite swam my horse, but I got wet.

Q. Got your feet wet? How long did you stay there then?

A. I was there one day, I think. If I recollect right, I got there in the morning and stayed that day and went away that night and went across the river and went to the ranch and came back across the river again.

Q. And took the train?

A. Yes, sir.

Q. When were you back there again after that?

375 A. I don't recollect of being at our ranch.

Q. No recollection of being at the range after that until the time of the first shipment from Iliff. Did you ship any cattle that fall?

A. I did.

Q. From Iliff?

A. Yes, sir.

Q. When was it?

A. I think it was about somewhere between eighth and fifth of October that I shipped the first cattle from Iliff.

Q. Were you there when it was shipped?

A. I was there.

Q. What kind of cattle were they?

A. I shipped steers and cows—beef cattle.

Q. Where did you get them?

A. I gathered that shipment—commenced gathering that shipment, if my memory served me right—that is, I gave instructions to—I saw the cattle at Sterling, but didn't see it until they got to Sterling, coming down the river. I saw them gathering around the round-up, and helped to gather them from Sterling down and from Sterling up. I only know what my instructions were, what they said they did.

Q. You say you were with the round-up from Sterling down?

A. Yes.

Q. And then cattle were gathered where that were shipped?

A. They were gathered about—commenced to gather what we call the slues, which is about twenty miles above Sterling. I should say along twenty-five.

Q. How far is Sterling from Iliff?

A. It is one station. I don't know whether it is fourteen or fifteen miles. I should think about that.

Q. You gathered down to Iliff?

A. Yes, sir; and below Iliff, clean down to what is called the Lone Trees, down to Mr. Rice's fence.

Q. Gathered all beef cattle?

A. Yes, sir.

376 Q. How many cattle did you have on this range there at Iliff when these Texas cattle were brought in?

A. Well, I could not say positively, but should put it anywhere from seven hundred to a thousand.

Q. What kind of cattle were they?

Q. All kinds. There was what we call range cattle, which were cows and calves and yearlings, and a good many Texas steers that had been brought in before, and then at the ranch we had a bunch of short horns and Polangus that we had got and kept around the ranch a good many years, bred up; they were thoroughbred when they started and we aimed to keep them alone and kept them almost thoroughbred for the purpose of breeding out bulls, and we always kept these cattle in the winter time in the ranch and fed them, and summer time would be in the pasture part of the time and part of the time out. At the time that I went across the river they were right below the J. B. ranch, between that and Iliff. I don't know how many head of those there was at that time, and part of them, or quite a number of them, were milch cows and kept inside.

Q. About the time that you were speaking, about the time that these cattle were—Texas cattle were—

A. Turned loose; yes, sir.

Q. Was there any effort to keep your Texas cattle distinct from them?

A. No, sir; we took them right in the corral where they were milch cows and thoroughbreds, and we had one or two bulls there what I paid two hundred dollars for as yearlings; kept—no; didn't try to keep them away from them at all.

Q. Let them mix right with that class of cattle?

A. Yes, sir; took the spade heifers and held them right in the pasture with them until we had them spaded out. I was
377 there—

Q. When did you move any cattle off of the range?

A. It was the fall before the last part, after the middle of October; which we do every year.

Q. What is the object of moving them away; moving the cattle away?

A. The cattle in that country on the south side of the river during the winter storms drift in the southwest direction, southeast direction it would be, and back south and southeast of the river trend, and the Western Union Beef Company, eight or ten miles in the last six or eight years, in the last ten years, had been settled all by farmers, and the storm would drift these cattle back in amongst the farms, and we had to move them up some twenty to thirty and forty miles and as high as sixty miles even above, to locate these cattle as the land would indicate was the best to be located. When they got up that far and drift south they would miss the farmers and didn't have the difficulty of having them in the farmers' crops.

Q. Is that the only purpose you had in moving them?

A. The only purpose.

Q. Did it have any reference to the Texas cattle at all?

A. No, sir; not at all; at that time I didn't have in mind where I would put them. The year before I took them above on the range, but this year before investigating—before the cattle was shipped—I discovered that the feed was splendid in that low end of the range, and instead of bringing cattle down as I have been bringing them down to the lower end in the spring, why I instructed my foreman of the cattle what cattle was there to leave—not to bring any more down, but to put these cattle there, as I knew I
378 was going to bring them through and we aimed to keep them. My instructions to him was to keep them from what is called Sterling or the Dobies down to Mr. Rice's fence, when I employed one Texas man to come through with me for that purpose, and my foreman employed him—I knew he was employed—and a young fellow by the name of Clement—Charlie Clement—and young Perkins to take care of these cattle.

Q. Did you have any one else on the ranch?

A. There was a ranchman, and Walter was there most of the time when he was not busy at somewhere else on the ranch—my foreman. My instructions was to locate the cattle. When we would brand a new bunch of cattle, no difference where you place them, I have always made it a rule to place one or two men to locate them.

Q. You didn't bring them up, these Texas cattle, and turn them loose and pay no more attention to them?

A. No, sir.

Q. Now, you came back there in October, as I understand, the next time you were back?

A. I don't think—I don't recollect of being at the J. B. ranch. I

was at Sterling most of the time ; I don't recollect ; I won't say positively ; I was not there at the J. B. ranch. There is nothing in my mind that refreshes my memory that I was at the J. B. ranch until I shipped, though I would not swear positively that I was not.

Q. As long as you have been handling cattle in that neighborhood, state whether or not cattle stayed at all times on one side of the river.

A. They don't nowhere on the river.

Q. What is the practice? .

A. Except in high water, and in the winter after the river is frozen over—then there is no crossing except at interims—I have known cattle by the thousands to go across the river on nights.

Q. In a bad storm?

A. Yes, sir.

379 Q. What is the rule at *ouster* seasons when the water is down? In the summer time how did they do?

A. They can go and come from one side to the other. Never since I have been in the cattle business, since McPhee and Mullen and myself have been in the cattle business together, I never rounded up a bunch of cattle on our side of the river that we didn't find some of Mullen and McPhee's. I never attended a round-up or had one or attended one by Mullen and McPhee that we didn't find cattle belonging to the Western Union Beef Company, although Mr. Mullen claims the north side and I claim the south side.

Q. Your cattle mixed up?

A. Yes, sir.

Q. Of course, when you say you claim—the great bulk of that is Government land?

A. Yes, sir.

Q. Both sides?

A. Nineteen-twentieths of the land we both run over is Government land ; probably a great deal more than that.

Q. How long has this Western Union Beef Company been organized?

A. Known as the Western Union Beef Company, I think, about six years.

Q. How long have they owned this range in Kimble county, Texas?

A. I think about ten years. Not the Western Union Beef Company, but what was called, which was the same thing, except a new company, the American Cattle Company, at one time owned it, and I think about six years ago was merged and formed into the Western Union Beef Company, a corporation of Colorado.

Q. Prior to 1891 didn't they ship any cattle from that range to Colorado?

A. Yes, sir.

Q. What year?

A. 1890.

Q. The year before?

A. Yes, sir.

380 Q. Do you know when they were shipped—what time of the year?

A. No, sir; I do not; I think, though, about June.

Q. During the summer, spring, or fall?

A. I think about June.

Q. Of 1890?

A. I won't be positive whether we shipped any cattle from that range in 1890 or not, or whether *er* shipped them to Montana or to Wyoming. I won't swear positively.

Q. Had you a range in Wyoming also?

A. Yes, sir.

Q. And did you ship any cattle from this Kimble county range there?

Objection by plaintiffs as immaterial. Objection sustained.

Q. Were there any quarantine rules and regulations in force in prior years—prior to 1891?

Objection by plaintiffs as immaterial. Objection sustained.

Defendant offers to prove by this witness that for years before 1891—

Objection by plaintiffs to the counsel stating orally his offer, and requests the court to require the same to be put in writing.

The COURT: He may state what he offers to prove, and, gentlemen of the jury, you will only consider what is admitted and not what counsel is offering.

Defendant offers to prove by this witness for several years the defendant company had shipped cattle from Kimble county, Texas, to different points in Colorado and Wyoming, and that no Texas fever or any disease had ever developed in any of these shipments; which offer was denied; to which ruling counsel for defendant then and there excepted.

Q. You were president of this board during April, 1891, I understand?

A. Yes, sir; I think it was in April some time.

381 Q. Did your board have any connections or transactions with the Bureau of Agriculture established by the United States Government?

A. It did.

Q. Do you know a man by the name of Pickerl, that Mr. Jordan testified about, as a special agent of the Secretary of Agriculture?

A. I do.

Q. Did he ever issue any written instructions in regard to this order of April 23rd which was acted upon by your board?

Objection by plaintiffs as incompetent. Objection overruled; to which ruling of the court the plaintiffs duly excepted.

A. He did. The Secretary endorsed it in my presence.

Q. When was that?

A. Some time in April—in May.

Q. Shortly after you came on the board?

A. Yes, sir. It was the time Secretary Rusk and President Harrison visited Denver. Just the date I could not say.

Q. You say the Secretary ratified these instructions?

A. He did.

Q. What were these instructions?

Objection by plaintiffs unless proof is made that the instructions were not in writing.

Q. The COURT: Haven't you the instructions?

Q. Do you know where Mr. Metcalf is or whether he has the original?

A. I don't.

Mr. BRYANT: I have a copy here that Mr. Brush can identify. I think Mr. Metcalf, the secretary, has the original.

Mr. MARKHAM: We want the original.

(WEDNESDAY, September 19th, 1894.)

Q. I was talking about that order of Watkins Pickernel last evening. Now, I wish you would state to the court without stating the contents of the order, as that would have to be proved in another way, all that you did or know concerning that order in connection with the State sanitary board of Colorado.

382 Mr. KINGSLEY: Of course, this is under our objection made yesterday as incompetent and immaterial.

Q. Perhaps you had better go back of that first. Do you know anything about the changing of these rules and regulations of April, 1891, by Secretary Rusk?

A. I do.

Q. State all that you know in regard to that.

A. I think early in the year 1891, in February, if my memory served me right, there was an order issued in 1891 or a proclamation concerning the transportation of southern cattle to the north, and in that proclamation it confined—

Mr. KINGSLEY: This is, as I suppose, the proclamation or regulation that is in evidence.

WITNESS: It is not. I don't think so.

Objection by plaintiff.

Q. That was the regulation that was issued in February, 1891?

A. Yes, sir; the first one of that year. He asked me in regard to the change. I don't know, it might be in evidence.

Mr. MARKHAM:

Q. They are both in evidence. That is the one you received or rather you are speaking about, now?

A. Yes, sir; in that proclamation, if my memory served me right and correctly, it took what is called only the Government line, admitted south, leaving out over half of that portion of Texas, in which for years Colorado, Montana, and Wyoming had been getting its

supply of steers. Many of us, myself among the others, had in that restricted district *had* made arrangements for the cattle for the coming season. At the request of the sanitary board of Colorado, representing the State of Colorado, and also at the request of other cattlemen, I went and made arrangements in connection with Dr. Holcombe, representing the State of Wyoming, the State veterinarian, at that time made an arrangement with Secretary Rusk some time in April, the exact date I cannot say, at home I could find

383 it, to meet him at Galveston. I invited to go with us Senator Teller, of Colorado; Judge Symes, of Colorado; and Senator Warren, of Wyoming, and Mr. Hayes, cattleman in Wyoming, and Mr. Holcombe met Secretary Rusk at the Beach hotel, in Galveston. There we met several gentlemen there from Texas, whose object was the same as ours, and went there, and one gentleman, I can't think of his name, from Montana, all had an interview with Secretary Rusk. We had the papers, and we had also the regulations with us of the sanitary board of Colorado, Wyoming, and Montana for years back, and we presented our claims to Mr. Rusk in regard to allowing or permitting these cattle in certain counties; among the others was Kimble; but I think there must have been some fifteen or twenty counties; I could not say positive, but among the rest was Kimble county, Pecos county, and a number of others. I know more particularly in regard to Pecos and Kimble, because I was interested in those counties. We had an interview with Mr. Rusk, I should think, about an hour. Senator Teller, Warren, and Judge Symes had or did most of the talking, and presented our case before him on Sunday, and asked his permission to ship these cattle in certain districts that were named and which had already been mapped out by the sanitary board of Colorado.

Q. Is that the map (handing same)?

A. That is the map. There is the line there; that is a Government line embracing; the next comes the Mexico line, marked there (indicating); then comes Colorado, Montana, and Wyoming. In this country through here, up to the railroad here, was a country that we went there to seek and ask admission to Colorado, Wyoming, and Montana. After consultation with the Secretary, he said that he would write to Washington and have a new order made,

384 and that he would admit, as I understood him, and we all did at that time, these cattle to be shipped into Wyoming, Montana, and Colorado, under the rules and regulations of the sanitary board of each and every one of these States. Some time after that the amended order came out, which as I heard it read is—

Q. That is the order of April 23rd which has been introduced in evidence?

A. April 23rd; I can remember the date now. When that order came out, instead of the order being that it should be under the rules and regulations of the sanitary board, there was a section put in that order that these cattle should be admitted and passed by the Government, but the sanitary board or other parties, I am not certain which, without saying which, should not allow these cattle to

mingle with any other cattle that was to be shipped to the market that season. The sanitary board of Colorado could not enforce that.

Mr. MARKHAM: You are talking about that. We want copies of what they did or what they wanted.

A. I was just going to tell you.

Mr. MARKHAM:

Q. We want that from authentic rules and not from you.

A. The sanitary board of Colorado could not or would not admit the cattle under that amended rule and order from the fact that it was impossible for them to admit the cattle here and have them on the range and keep them from mixing. Secretary Rusk from Galveston informed us that he was going to California at that time. Consequently the board of Colorado commenced by telegram with the chief of the Animal Bureau, this gentleman, Solomon—I don't
385 know exactly what his proper name should be—but he is chief of the Animal Bureau and the United States veterinarian.

We commenced corresponding with Mr. Solomon in regard to this section two. We received, I think, by telegram communication from him that he had sent a special—

Mr. KINGSLEY: Have you got that?

A. I haven't; I am not positive whether I received a telegram or letter.

Objection by plaintiffs.

The COURT: Just state what was finally done.

Q. Did any one come as the result of that correspondence?

A. Mr. Watkins Pickeral, special—

Q. Representing the department?

A. Representing the department; said to me he was, as president of the board, and called on me at Greeley, and said to me as president of the board—

Objection by plaintiffs as incompetent, immaterial, and irrelevant. Objection overruled; to which ruling of the court the plaintiffs duly excepted.

The COURT: You may state just what was done and said between you.

A. That is all I was going to state. He stated to me that he came out as special inspector of the Secretary of Agriculture, by the order of the chief of the Animal Bureau, Dr. Solomon, to arrange satisfactorily for the introduction into Colorado, Wyoming, and Montana, in this what he called the restricted district—he stated to me at that time that he had just come from an interview with Dr. Holcombe, of Wyoming, and that he had instructed the Wyoming board to admit cattle; that section 2—I think section 2, I could tell by seeing it—that section 2—

Objection by plaintiffs as incompetent, the same being in conflict with the rules and regulations of the department of the United States.

386 Mr. BRYANT: We propose to show it was a general rule and thousands admitted.

The COURT: The question to be determined by the jury is whether under the circumstances of the case the defendant company was guilty of negligence or whether it exercised ordinary care and prudence in the premises. I therefore permit all the facts in the case to go to the jury, and then I will determine as a question of law whether these rules that the witness is now testifying to were made in violation of statutory rules or regulations. I permit the facts to go to the jury in order that they may determine whether the defendant has been guilty of negligence or not. You may proceed.

Objection overruled; to which ruling of the court the plaintiffs duly excepted.

WITNESS: Mr. Pickerel was there in May, I think; as near as I can recollect, somewhere about the 8th, 9th, or 12th of May. He told me what he had done in Wyoming. He told me what he was going to do and instructed me that the cattle could be admitted—or stated at that time that he preferred to wait until he saw Secretary Rusk, which I think it was the next day that he came to be in Denver. I think he was the next day. He came to Denver and came to Denver the next day. I saw Mr. Pickerel again the next day. He said he had an interview with Secretary Rusk. He had told him what he had done and Secretary Rusk endorsed it and said it was all right.

Q. Did you see Secretary Rusk the same day?

A. The same day I met Secretary Rusk and Mr. Symes, and I had requested Mr. Symes, as he was interested in the company and interested in this whole country here, as we had other prop-
387 erties which he was interested in besides Kimble county, especially Pecos, to see Secretary Rusk on his arrival at Denver. I met him on the street. Symes says, after shaking hands with the Secretary—he says, “Have you seen the special agent, Mr. Pickerel?”

Mr. MARKHAM: Who said that?

A. Symes said that to me.

Q. In Secretary Rusk's presence?

A. That was the first introduction—the whole conversation. He says, “The Secretary informs me that he has arranged for these cattle, and that restricted district to be admitted without the restriction of section two”—if I am correct in the section 2. I haven't got it here to refresh my mind.

Q. Let me read section two and see if that is the one.

Mr. MARKHAM: It is section two.

WITNESS: I haven't got it to refresh my mind. That section two should not apply in any way or form in Colorado, Wyoming, and Montana. The Secretary said—turned to me—he says, “Is that satisfactory to you both?” I said, “Perfectly.” We hardly stopped; it was not more than a minute and a half conversation.

Q. He asked you if it was satisfactory to your board?

A. Yes, sir.

Q. You were president of the sanitary board of Colorado at that time?

A. I was at the time; yes, sir.

The COURT: That was in May?

A. That was in May; the time that he was here, and the time that I met him was the time that he and President Harrison made the trip, and, if my memory served me right, it was along near the 10th or 12th of May; I would not be positive.

Q. The written order signed by Mr. Pickerel, I understand you to say you have?

388 A. That is with the secretary of the board—it must be.

Q. Mr. Metcalf?

A. I don't think I ever had or saw it, except when he told me what he done. He pulled out and read——

Mr. MARKHAM: I would like to cross-question him a little.

Cross-examination:

Q. I don't know yet whom you say signed this written instrument for you to dispense with article two of the rules and regulations.

A. Mr. Pickeral, at the time he was at the house, pulled out of his vest pocket and read to me what he had done. I didn't see the written order. He read over what he had done, and think I recollect it. I might miss a word or two.

Q. Who signed it?

A. Mr. Pickeral signed is as special agent.

Q. Anybody else?

A. No, sir; I don't think so.

Q. Ever signed by Secretary Rusk?

A. No, sir.

Q. He simply told you that he endorsed what Pickeral had done?

A. He did; yes, sir.

Q. Where is that order signed by Mr. Pickerel?

A. I don't know.

Q. Where ought it to be?

A. It ought to be in the records of the sanitary board.

Q. Have you looked for it?

A. Yes, sir; I have never seen the original. I saw a copy in our minutes.

Q. Where did you get this copy from?

A. I could not tell you.

Q. And you never saw the original. How can you tell, then, that this is a copy?

A. I could not tell you.

Q. Could not tell?

A. Only what it is purported to be. I know it from my memory.

Mr. BRYANT: That is a copy taken from the minutes of the sanitary board of Colorado?

WITNESS: That is a copy from the minutes. I took it down at the time he read it—exactly what it was—in a little book.

389 Q. You didn't take this down—this copy (handing paper)?
— I don't know what that is.

Objection by plaintiffs to the reading of said memorandum in evidence, and also to the original (if the same is produced).

Redirect examination :

Q. Were you acting at that time as president of the State sanitary board?

A. I was.

Q. In your official capacity?

A. I was altogether.

Q. And what other sanitary boards were acting with you in that matter?

A. What States? Wyoming and Colorado—all were acting.

Q. You mean Montana?

A. Montana—we were all acting, and had all that season agreed to inspect cattle, and every one of the States—

Q. Dr. Holcombe was the State veterinarian?

A. Yes, sir.

Q. Representing the Eastern States?

A. Yes, sir; had direct superintendence of southern cattle.

Q. Mr. Pickerel had been to Montana?

A. I don't think to Montana.

Q. I mean to Wyoming.

A. He had been to Wyoming, so he informed me.

Q. And the same order was made there?

A. Yes, sir.

— Exactly the same. Do you know whether or not many Texas cattle were admitted under that new order?

A. Yes, sir; I do.

Q. In what States?

A. State of Colorado, State of Wyoming, and State of Montana.

Q. Was the order made in reference to this particular bunch of cattle?

A. No reference at all to the Western Union Beef Company; covered a large scope of country. I could name the counties here
390 which all parties were interested in, and that these parties had thousands of cattle to be delivered that spring on the railroad, according to the rules and regulations heretofore in Montana, Colorado, and Wyoming, and they were very much interested in the revision of the order.

Q. Cattlemen generally?

A. Cattlemen generally. The Western Union Beef Company, as one of those interested, had delivered an order from the restricted district some eight or ten thousand head of cattle to Wyoming from Pecos county, which Mr. Jordan knows well.

Q. That is an adjoining county to Kimble?

A. No, sir.

Q. And these are the circumstances under which the order was changed, and these cattle—you finally shipped these cattle after the order was changed, the cattle were shipped?

A. Yes, sir.

Mr. MARKHAM: These rules and regulations changed?

A. After the regulations were changed; after Mr. Rusk, through his agent and by himself, had given us authority to unload these cattle. The State board of Wyoming, Montana, and Colorado met and decided to admit the cattle and to turn them loose there as any other cattle, as we had always done heretofore.

Q. Has the State of Colorado adopted rules and regulations—I mean sanitary board of Colorado adopted rules and regulations which were for the admission of cattle?

A. They have.

Q. And you acted in concert with any other States?

A. Generally in concert; I don't know that we had each and every year in concert with Wyoming and Montana.

Q. Did you in 1891?

A. We did.

Q. And were the rules and regulations of Montana — Colorado identical?

A. Identically the same inspector inspected for Montana, Wyoming, and Colorado.

391 Q. And were they agreed to by the State board or veterinarian?

A. They were.

Q. In each of these three States?

A. Yes, sir.

Q. All three of them?

A. All three of them. The sanitary board endorsed it.

Q. These cattle were admitted in accordance with these rules and regulations?

A. They were.

Q. Do you know whether the State of Texas has any rules and regulations in regard to that?

A. They have not at this present time.

Q. Had they in 1891?

A. They did not.

Q. They were not particularly interested in Texas fever?

A. Some parts of it were.

Q. Have you ever made a study of the subject of Texas fever? Do you know anything about it? Did you ever see a case of Texas fever?

A. I am not sure that I ever did see an animal sick with the Texas fever. I think that in the Indian Territory that I saw an animal or two that were purported to be Texas fever.

Q. How long have you been connected with sanitary boards?

A. Since the last time I was appointed during Governor Routt's administration, and I took the office, I think, the last of March or the first of April, I would not say certain, and I held that for two years.

Q. Had you been connected before that time with the board?

A. I was one of the sanitary boards in the first organization of the law, and I think, if I mistake not, I was belonging to the sanitary board six years right along; president of the board.

Q. Did you investigate, theoretically or otherwise, this question of Texas cattle or Texas fever?

A. I did in general.

392 Q. Did you ever attend any meeting of the veterinarians where the subject was discussed?

A. I was in the meeting of all the sanitary boards of the United States and the State veterinarians of the United States. When I say all, all were invited, but not all there, and a large representation of the State veterinarians from Canada and England, and it was in Chicago.

Q. What year was that?

A. I have been trying to refresh my memory to see.

Q. Was it prior to 1891?

A. Yes, sir. I presided over the meeting a good part of the time; was elected president at that meeting of the association called the Association of Sanitary Boards and Veterinarians. At that meeting the matter was discussed pro and con by a great many of the learned veterinarians of the United States.

Q. Was the subject of Texas fever discussed?

A. It was.

Q. At that time was then what is known as the tick theory in existence?

A. I never heard it discussed or brought up.

Q. What was the accepted opinion at that time as to the cause of Texas fever, if there was any accepted opinion?

A. Very diversified.

Q. What was the general theory? What was it attributed to, if you know?

A. Generally thought it came from the saliva; general opinion, I think, or, rather, the general opinion briefly that it was from the manure of the animals. Some thought it was the saliva that came from the mouth of the animal.

Q. Had the tick theory developed, as far as you know, and discussed prior to 1891?

A. I never heard it discussed in 1891.

Q. When did you first hear of it?

A. I think in 1892. I received every year the reports of the Secretary of Agriculture, and I always turned my attention to that, and I can't say, but I think in 1892 was the first I saw of it.

393 Q. It is generally accepted now among cattlemen and veterinarians?

A. Very great diversified opinions.

Q. And the effect of the high or low altitude anything to do with it, in the opinion of stockmen and veterinarians, prior to 1891?

A. It had all to do with it and has all to do.

Q. What was the general opinion as to that?

A. That low altitude, damp, and wet were more liable to convey the disease than high.

Q. What was the character of the country in Kimble county, Texas?

A. Part of it is rough—rocky. I don't remember the altitude of Kimble county. I did know, but I—

Q. Was it high and dry?

A. The range or pasture in which these cattle were was very rough, high, rolling country and rocky; no swamps or no low ground, except right—

Q. Do you know what the general opinion of cattlemen and veterinarians was in regard to that section of country at that time?

Objection by plaintiffs as incompetent, immaterial, and irrelevant. Objection overruled; to which ruling of the court the plaintiffs duly excepted.

A: When I became a member of the board, in 1891 or shortly afterwards, I had a consultation with Dr. Lamb, who had been up to that time, I think, for five or six years, maybe, State veterinarian of Colorado. I had consultation with Dr. Holcombe, who had for several years been State veterinarian for the State of Wyoming or Territory. I had a consultation with the State veterinarian of Montana, and in discussing the matter of Kimble county particularly they all decided that the altitude was such they considered the cattle perfectly healthy to be shipped from the south and had made a unanimous report to their sanitary boards.

394 Mr. MARKHAM: We want some limit to this class of testimony.

(Question read at the request of the court.)

WITNESS: I was giving what the opinion of the three veterinarians were.

Objection by plaintiffs.

Mr. BRYANT: I mean men who were familiar with that country. I will change the question.

Q. Cattlemen who had experience with Texas fever; men familiar with that section of country, and veterinarians.

Objection by plaintiffs renewed.

The COURT: I think we will not go into details what these men have said one way or the other. He says the opinion was generally. You may ask him what it was; whether cattle might be shipped from there with impunity or not; and if they wish to go into details to know how he gets this knowledge they can do so.

Q. I have no desire to go into details. Do you know what the general opinion of cattlemen who were familiar with Texas fever and familiar with the section of Texas in which Kimble county is located, and veterinarians who had made a study of this question, was in regard to that section of country as to being dangerous or not?

Objection by plaintiffs as calling for an opinion of parties of whom nothing is known.

A. I don't. I can't say what I know the information of cattlemen was at that time. I do know the veterinarians'.

Q. Do you know what the opinion of veterinarians was?

A. Yes, sir.

Q. What was that opinion?

Objection renewed by plaintiffs. Objection overruled; to
395 which ruling of the court the plaintiffs duly excepted.

A. That the cattle was healthy, from a healthy part of the country, and no danger in being admitted to Colorado, Montana, and Wyoming.

Q. I believe that you testified that you had been in the cattle business along the Platte river for a good many years. Were you acquainted with the value of range cattle that year in the vicinity of Iliff and Crook?

A. I think I was.

Q. It has been testified that some one hundred and sixteen or twenty head of cattle belonging to the plaintiff died, the cattle consisting of steers, cows, and six bulls, forty-six American cows three to eight years old, twenty-three steers from two to three years old, mostly two-year-old.

Q. Give the ages in asking the question and I will endeavor to answer.

Q. Mostly two-year-old.

A. If you give us the ages I could answer it according to the ages, my judgment.

Q. What would be the average value of that number of cattle of that class?

A. I would say American cows in 1891, with the calves by their side, were worth from fourteen to seventeen dollars.

Q. American cows three to eight years old?

A. Yes, sir; ordinary.

Q. You know the herd of Mullen and McPhee, did you not; acquainted with them?

A. Yes, sir; some.

Q. Do you know the class and grade of bulls that they have?

A. My knowledge of them—I think very good class of bulls.

Q. What were they worth?

A. Thirty to thirty-five dollars, I should say; some of them more.

Q. What would four-year-old American steers be worth?

A. From thirty-two to thirty-five dollars.

396 Q. And what would two-year-old heifers be worth?

A. About thirteen dollars, natives.

Q. What would three-year-old steers be worth?

A. What class?

Q. American.

A. About thirty dollars—thirty to thirty-two dollars.

Q. That is, in the month of September and October?

A. If they were fat.

Q. What were yearling steers worth?

A. Ten to twelve dollars.

Q. What would three-year-old Texas steers be worth?

A. Twenty-two dollars to twenty-five dollars. Three-year-old about twenty dollars.

Q. What would one four-old be?

A. Twenty-three to twenty-five dollars.

Q. What would yearling heifers be worth?

A. Nine to ten dollars.

Q. That is, Americans?

A. Yes, sir.

Q. There are only two Texas; all I have been talking about are American; simply two Texas. Now, what would be the value of calves that fall without the cow, the cows having died, and died with them or died afterwards—the calves?

Q. It would be owing a great deal to the age of the calf. I should say they would range all the way from three dollars up to seven dollars.

Q. You said cows with their calves at their side were worth fourteen to seventeen dollars. Supposing the cow should die and the calf left, and then both the cow and calf died, what would they be worth together, worth only fourteen to seventeen dollars?

A. I don't think they would. A. I think——

THE COURT: Supposing the calf to die, then what was the cow worth? You say a cow and a calf by the side is worth so much?

397 A. It would increase the price from seventeen dollars, owing to the size of the calf, from three to seven dollars. If a small calf worth three dollars or probably four, if it was a big, fine calf five or six months old, worth seven dollars.

Q. If the calf had been born that spring, early in the spring?

A. Born early in the spring, and had done well, it would be worth—some of them would be worth seven dollars. In case the mothers had died along in September or August, the calves that would die would be the young ones, smaller ones.

Q. A calf that was born early in the spring and was worth seven dollars would be apt to get along all right?

A. The chances are it would live, but it would be too early to wean them. The calf probably born in March would live through on grass, but would not be as good an animal at a year old or when two or three years old as if it had run with the mother during the fall.

Q. The ones that would die would be the ones that were born along in the summer?

A. Yes, sir.

Q. You have heard Mr. Powell testify, and Mr. Ford, I believe it was, as to certain conversations had with you at a meeting in Sterling in the fall of 1891. Did you hear that testimony?

A. I did.

Q. Were you present at that meeting?

A. I was.

Q. What was the object of the meeting?

A. They met, if my memory serves me right—the commissioners requested—I met there at the request of the parties who had suffered.

The COURT: Whom do you say? Who requested you to come?

A. The commissioners.

Q. County commissioners?

398 A. I think, in answer to a request of the commissioners of Logan county; I think so. I am not sure whether I received a request or not from Mr. Powell or any of the other parties that lost cattle. I am not sure that I did. I might have done so, but I don't know that.

Q. Are you positive that you received a request from the county commissioners?

A. I think I did.

Q. What was the object of the meeting as you understood it?

Objection by plaintiffs.

The COURT: You may just state how it was called and what was said and done. The jury will have to arrive at the object from all the facts and circumstances.

Q. What was the meeting called for?

A. As near as I understood, it was called to meet the men to consult, myself representing the Western Union Beef Company and the other parties representing their own interests. The commissioners — Logan county, as I understood it, were representing the community at large. We discussed the breaking out of the disease and we discussed the prices to some extent. The conversations, as I remember, with Mr. Powell, and also with Mr. Ford, that I spoke about. I said to them, from the reports of the veterinarians and the reports of other parties interest-, so far as I was concerned myself, I didn't admit but what it was Texas fever. I hadn't seen any of them at all.

Q. Did you make any statement about your authority to settle and compromise?

A. I stated to them that it was a matter, a question, a very strong question, whether, if it was Texas fever, the Western Union Beef Company give it to them, and I would inform my attorney that even if they had given it to them, under the rules and regulations that had been complied with, that the Western Union Beef Company was not responsible, but he informed me that the State of Colorado might be.

Q. Can you give the substance of the conversation?

399 A. I can, Mr. Powell; I can give it all. It was quite an excited meeting and a great many there talking. I endeavored very closely to guard what I said myself, because, representing the company as I did, under the instructions of the attorney of the company, I was very guarded in what I said. I never at no time admitted that I knew it was Texas fever, because I didn't and didn't

then and don't yet. Neither did I ever admit that the Western Union Beef Company conveyed the disease, because I didn't know it. I might have said—probably did so—at that meeting that it looked very suspicious, as though the Western Union Beef Company had done so—the cattle had conveyed the disease. I was not familiar with the disease at all. I didn't see any of the cattle sick.

Q. Were you away much that fall?

A. I was away most of the time in Texas.

Q. What time did you get back?

A. I think I was home—I think I was at home some time in—Mr. Mullen wrote me. I can't remember the date. The letter is there on file. I was home at that time, and I met, I think, about the 30th of August—I think it was about the 30th of August or September—I can't say—I was at Sterling and met Dr. Lamb there. Dr. Lamb informed me at that time, if my memory serves me right—I had Dr. Lamb to go down and investigate at that time—he informed me at that time that it was Texas fever, in his judgment.

Q. That was, you think, about the 30th of August?

A. I think it was there before that; I think he was there about the 26th of August.

Q. What is the usual time for Texas fever to break out after cattle come in contact with it?

400 A. The tick theory says, the best information we had—the best that I could get—was from fourteen to twenty-eight days.

Q. After twenty-eight days?

A. They seemed to think they were safe.

Q. You first heard of this about the 30th of August?

A. No, sir; I did before that.

Q. You were written to by Mullen and McPhee some time about the 30th of September?

A. I think I had a communication myself from my foreman before that; I don't know. I don't know as it was before the communication from Mullen or not.

Q. Some sixty or seventy days after the cattle had been placed on the range?

A. I think it was.

Q. Would the moving of Texas cattle at that time stop the disease, have any effect on it, provided it came from your cattle?

A. Moving the Texas cattle at any time after the disease broke out, in my judgment, would not remedy any of the cattle whatever.

Q. Would not do any good?

A. No, sir. If they had come in contact and had given the disease, the moving of them would not stop it.

Q. Even if these cattle had communicated the disease, it was then too late, so far as moving was concerned, to do any good?

A. Yes, sir.

Q. It is a fact, whatever may be the cause of the disease, that affected cattle cannot communicate it to one another?

A. They will not.

Q. And that after a certain length of time Texas cattle will not communicate it to native cattle?

A. The theory that the Animal Bureau goes on, and the veterinary boards that I know of and veterinarians, are that cattle kept in an unaffected district north of an infested district ninety days are perfectly harmless to convey the disease.

401 Q. That is, then, the theory of the tickmen?

A. Yes, sir.

Q. If they are kept from thirty to ninety days, that is sufficient?

A. The State of Colorado has always admitted cattle from any part of Texas that have been driven ninety days on the road, no difference where they come from. They have never had any disease, to my knowledge, by this. In the early days when they were driven up here, they had no disease.

Q. Did you ship cattle that fall from Iliff?

A. I did.

Q. When, if you know?

A. I think it was the 8th or 10th of October.

Q. Do you know when they had a frost that year?

A. I wasn't there during the frost. I don't remember when the frost was there except from reports.

Q. Do you know that from hearsay?

A. I do, altogether.

Cross-examination:

Q. How long have you been in the cattle business, since '63?

A. That is when I started; yes, sir.

Q. How long have you had any experience with Texas cattle?

A. I think between fifteen and twenty years; somewhere there.

Q. You heard what your son said about where the ranch and range are of your company?

A. Yes, sir.

Q. He stated it correctly, didn't he?

A. I think he did, generally correct, as near as I can recollect.

Q. This defendant company was organized in 1887, wasn't it?

A. I think about that time.

Q. Some sort of consolidation of various other cattle companies?

A. It was.

Q. All the other companies put their ranges and their herds and so organized themselves into a large company, didn't they?

A. Yes, sir.

402 Q. Were you connected with any of these companies which were swallowed up by this defendant?

A. The Brush Land and Cattle Company sold out to them. I was one of the stockholders of the Brush Land and Cattle Company.

Q. In 1891, I think, you said the defendant company owned various ranges in Texas, didn't it?

Q. Yes, sir.

Q. Owned more than one range in Kimble county?

A. No, sir.

Q. How many other counties in Texas had it ranges, if any?

A. Range in Uvalde county. I have to refresh my memory by looking at the map.

Q. Do you know how many? I am not particular.

A. It had — in Uvalde county, Maverick county, at that time; it had one in Stockton, a large range, and one other range that I disremember the county, not a little way from Uvalda.

Q. Were all these ranges within this district embraced within the order of the department of the 23rd of April?

A. No, sir; some of them were outside entirely south of the Colorado line.

Q. Some of them were north of that line?

A. Some of them south of Colorado and Montana line—Uvalde.

Q. When you speak of the Colorado and Montana line you refer, do you not, to that line as that line which would be the east and wouth line of the area described in circular from the department at Washington, dated the 23rd of April? Do you understand the question?

A. I think so; I think that is the case.

Q. I want to see if I understand you.

A. Yes, sir; I could not say without going through that circular. I know where the line was, but without going through it I could not say positively that was the case.

Q. Let me ask you this: Do you know where the line was
403 east or south of which cattle were not permitted to be shipped prior to the order of the 23rd of April?

A. I do; by the Government.

Q. You know where that line was?

A. Yes, sir; I do—that is, prior to the issuing of the circular in February up to the issuance of the circular on the 28th day of April.

Q. 23rd of April?

A. 23rd of April.

Q. In other words, you know where the old line was?

A. Yes; I do.

Q. Prior to the 23rd of April you know?

A. Prior to that and the issuing of the 5th of February—

Q. You know where the old line was as fixed by the February circular?

A. Yes, sir.

Q. You know where the line was changed as fixed by the 23rd of April?

A. I do.

Q. Now, how many ranges of your defendant company by the direction of the 23rd of April were taken out of the old district and put into the new?

A. Two.

Q. What counties were these?

A. Pecos county and Kimble.

Q. Now, these were the only two counties in which at that time, the 23rd of April, 1891, you had ranges in that new district?

A. That is, the Western Union Beef Company.

Q. How many cattle had you at that time in that new district?

A. As near as I can remember, as I was conversant with the herd—back, as near as I can remember, in Kimble county pasture, what is called the Wilson range, we had between five and six thousand head of cattle of all classes. In Pecos, what we call the Ft. Stockton ranch—in Pecos county, I think, we had in the neighborhood of twenty to twenty-three thousand head of cattle, and maybe twenty-seven, I am not positive, of all *calsses*.

404 Q. You had never prior to this shipment shipped any of your cattle from Kimble county to Colorado, had you?

A. Not directly from Kimble; we did from Pecos.

Q. Had you from Pecos county?

A. From Pecos county every year for six or seven years we have shipped cattle to Montana.

Q. Had you shipped any from Pecos county into Colorado prior to 1891?

A. I think not.

Q. Have you since?

A. I think not.

Q. Have you shipped any from Kimble county since 1891 into Colorado?

A. I have not.

Q. Prior to this shipment in June, 1891, had you ever shipped into Colorado by rail any Texas cattle?

A. Yes, sir.

Q. From Quanah?

A. Yes, sir; from Vernon.

Q. Where is that?

A. The year before I shipped some cattle that had been *fecthed* from Kimble county in the fall, north of the line, at that time, and some eleven hundred head that were shipped at Vernon.

Q. Where is Vernon?

A. It is about—I think it is thirty or forty miles south of Quanah. I don't know just exactly.

Q. Shipped them by rail?

A. Yes, sir.

Q. These cattle which you shipped at that time from Kimble county, how long had they been in Kimble county?

A. All of them six months or over.

Q. They were driven up to Quanah?

A. Yes, sir.

Q. Did you meet them at Quanah?

A. I did.

Q. Went from here down there for that purpose?

A. Yes, sir; I did.

Q. When did you first conclude to make this shipment?

A. I think, in *Janaury*.

Q. 1891?

A. 1891; I am not sure just the time. I give orders some time in spring, and expected the cattle to start every day.

405 Q. You were at the time president of the State sanitary board?

A. Not at that time.

Q. Not in January?

A. No, sir.

Q. You became such in April?

A. I think it was about the 5th of April or last of March.

Q. It was in January when you concluded to make the shipment from Kimble county. Now, when was it you met Mr. Pickerel here?

A. I met him—I made no arrangement to meet Mr. Pickerel that I know of, except I made arrangement with Dr. Solomon—at least, he stated that he would send a special agent. I didn't know who it was until I met him.

Q. Just prior to your meeting Mr. Pickerel there, and after you had concluded to make this shipment, you corresponded, did you, with the department at Washington?

A. Met Mr. Pickerel where?

Q. Didn't you meet Mr. Pickerel at Quanah?

A. No, sir.

Q. Then I am wrong about it. I thought you met Mr. Pickerel at Quanah.

A. He came to Greeley, to my residence, and stayed all night with me, the first I saw of him.

Q. I am mistaken.

A. I met Mr. Jordan at Quanah.

Q. I know. You met Mr. Rusk—where did you meet him?

A. At the Beach hotel and at Denver.

Q. Did you meet Mr. Pickerel at Galveston?

A. I did not.

Q. Before meeting Mr. Rusk at Galveston did you make any arrangements for the meeting by correspondence with Washington?

A. I think we said, if my memory serves me right—I don't know who said it or whether Mr. Symes said it or whether the stock agent of the Fort Worth said it—I am unable to say—but I know that we had the time, date, and place to meet the Secretary, Mr. Rusk, and he would lay over at Galveston on a certain Sunday. The date of the month I think I disremember.

A. Made arrangement to meet him there?

A. We arranged to meet him there, and got in Galveston on the Sunday morning.

406 Q. That meeting with the Secretary was of necessity in order to enable you to make this shipment that you had in contemplation, was it not?

A. Not altogether; no, sir. It was necessary—

Q. When you first contemplated making this shipment you didn't expect to bring them up to Iliff, did you?

A. When I first contemplated making the shipment there was no restriction.

Q. In January?

A. No, sir; no restrictions at all.

Q. In the winter months, you mean?

A. A proclamation of the sanitary board of Colorado.

Q. You don't understand me. You expected to make this shipment—that is, in January you contemplated making this shipment some time during that spring or summer, as I understand you, did you?

A. I did. I expected to bring or move these cattle.

Q. When did you expect to make that shipment—that is, when in January did you contemplate making the shipment?

A. I don't remember what time it was. I was down there in Texas in January, looking over the range to see how many cattle were to be moved north among the rest. I thought there would be something in the neighborhood of three thousand head to move north from Kimble county.

Q. And at that time you say there was nothing to prevent their shipment at that time?

A. There might have been something of the sanitary regulations, but we expected to overcome that and move them north, on what is called the neutral ground between this part here—to move them here and hold them there ninety days until they could come into the State of Colorado, but after that the State of Colorado sanitary board—or before, I don't know which—at least extended the line

in 1891, which took in Menard and Kimble county, before
407 I was a member of the board. I found out so when I came on the board. I don't know the date they passed an order—

Q. It was in January or February that you were down there on the range in Kimble?

A. Yes, sir.

Q. Were you there on the range as late as February 6th, at the time that department regulation was —?

A. No, sir.

Q. You had left there before that. When did you first hear that?

A. I could not tell you. I presume—that is, I never—being a member of the sanitary board officials and being connected with and knowing Dr. Solomon, I think he always sent me a circular. I think so, but I could not say the date. I can find it home when I received it.

Q. Under that circular of February 6th, did that interfere with the shipment of these cattle from Kimble county?

A. Yes, sir; and from some fifteen or twenty other counties. Yes, sir.

Q. So that in order, then, after that, to carry out your object and make this shipment it was necessary for you to get around that circular or regulation of February 6th, wasn't it, to ship these cattle from Kimble county?

A. In order to—

Q. Answer. It was necessary?

A. Yes, sir.

Q. After you found that out you opened up negotiations or entered into a program by which you could remove that obstacle?

A. Any more than we ask. We expected to go to Washington, consisting of a representation from Wyoming; a representative from Colorado and Montana.

Q. Well, now, then——

A. And on learning — we found that Secretary Rusk was on his way from there——

Q. I am simply asking you——

A. Then we opened our correspondence either by telegram; I think by telegram. I think Judge Symes conducted it.

408 Q. I don't know but you have answered the question.

What I want to get at is this: When you found that *that* the regulations of the department of February, 1891, interfered with the shipment that you had in contemplation, you then began plans and operations for a modification of these regulations, so that you could carry out that shipment. Is that true?

A. I don't remember the time we commenced it.

Q. But you did, as a matter of fact?

A. I think February we did. I think we corresponded with the department and were informed that the Secretary was not there. Then we opened communication with him and met him.

Q. How early in April were you made a member of the sanitary State board?

A. I think about the first; I think so.

Q. Then the interest that you were taking at the time or procuring a modification of this order you were not doing it as a member of the State sanitary board, but as a representative of this defendant company?

A. I was doing it as a member of the sanitary board.

Q. Were you a member of the sanitary board at the time?

A. At the time I went to Galveston I was.

Q. How long had you been a member of the board?

A. Eight, ten, or twelve days; at least fifteen.

Q. At the same time you were general manager of this defendant company?

A. Yes, sir.

Q. The fact, then, that you were general manager of this company and desired to make this shipment in its behalf, which operated the most in your mind to bring about this modification in the interest of the State as a member of the State sanitary board or as general manager of this defendant company?

A. I think altogether nearly, except that it would have delayed me, I went to — from Kimble county—I think it was in the interest of the stock interests, as I look at it, purely urged on by the railroad, purely urged on by the stock yards and by the stockmen
409 generally. Heretofore these orders had been issued, but always had been revoked the same as this had for the last three or four years.

Q. You were representing at that time the company that had the most extensive ranges and the largest herds of cattle of any in the western country, were you not?

A. One.

Q. Was there any company that had cattle in Wyoming, Montana, or Colorado that compared with your company in size, extent, and improvements?

A. I think not.

Q. As general manager of the defendant company, you were aiming to do what you considered its best interests in the management of its affairs and the shipment of cattle, and all that sort of thing, were you not, from south to north?

A. I presume so. I was. I always tried to.

Q. I will put the question to you again. Were you not more interested in procuring a modification of that order in the interest of the defendant company than you were as a member of the State sanitary board?

A. I think not.

Q. You think if you had not been the general manager of this defendant company that you would have exercised yourself constantly as you did to procure this modification?

A. I would; yes, sir.

Q. How soon after you became the general manager or had your official connection with this defendant company did you procure an appointment on the State sanitary board?

A. I am inclined to think that when I was made general manager without being positive that I was on the board—

Q. Sir?

A. I think I was on the board when I was made manager of the company.

Q. You think you were?

A. I think I was.

Q. Are you positive?

A. Well, I am almost positive.

Q. Now, Mr. Brush, don't you know, as a matter of fact, by refreshing your recollection, that it was after your connection with this defendant company that you were appointed on the
410 State sanitary board?

A. I know as a fact that it is not a fact; that I requested Governor Cooper, when I was on the board—a member of the board—not to appoint me while I was general manager, but to appoint Mr. Fine Ernest, and he done so. I didn't want it.

Q. Did you say that when you were manager of the defendant company you requested not to be appointed?

A. I did, sir.

Q. By Governor Cooper?

A. Yes, sir.

Q. Well, when you were appointed you say at that time you were the manager of the defendant company?

A. I was.

Q. That is what I—

A. The last time I was appointed.

Q. The last time?

A. I held it six or eight years before that.

Q. You were on it in all some six or seven years?

A. Yes, sir. I think I was a member of the sanitary board when I was made manager.

Q. Then your first appointment to the State sanitary board was about simultaneous with your becoming general manager of this defendant company?

A. It was before.

Q. About simultaneous?

A. Before; two or three years before.

Q. Well, state to the jury now long, in all, you were a member of the State sanitary board.

A. I cannot say. I was——

Q. Who first appointed you?

A. I was first with the sanitary board after the organization and passage of the law. I think I was made the first member of the board—Mr. Fable and myself. Dr. Fable was the veterinary surgeon.

Q. By what governor were you first appointed?

A. I could not say.

Q. You cannot give the year?

A. No, sir; I cannot give the year.

Q. You cannot say how long it was before the organization of this defendant company?

411 A. It was some time before the organization.

Q. In what year was this defendant company organized?

A. The Western Union Beef Company, I think, about six years.

Q. In the year 1888?

A. 1887 or '88. I don't know positive. It was a company long before that held by other different companies.

Q. Could it have been as early as 1886, or have you any distinct recollection?

A. I have not.

Q. Was it or it might be in 1886?

A. I don't think it was, but I could refresh my memory at my home, because I have all the papers there. It was organized——

Q. Were there any other cattlemen members of this State sanitary board in May, 1891, except yourself?

A. Yes, sir.

Q. Who were they?

A. H. H. Metcalf.

Q. Once there were three of you, were there not?

A. Mr. Stubbs—he was put on the board to represent the sheep.

Q. So there was one sheep interest?

A. And the cattle—two cattle.

Q. Mr. Metcalf was not very extensively engaged in the cattle business?

A. He was quite extensively engaged at that time.

Q. Now, I think you have said, or I will ask you if, as a matter of fact, and, if so, who it was, besides your sanitary board and yourself, that met Mr. Rusk down there in Galveston.

A. Dr. Holcombe, representing Wyoming.

Q. Veterinarian surgeon?

A. Yes, sir. Senator Warren.

Q. He is from Montana?

A. Wyoming. John Hayes, who is an extensive—or was at that time—cattleman and cashier of Stockgrowers' bank in Wyoming, and we met—I know we met Senator Teller, of Colorado; Judge Symes, Colorado, and Mr. Larry; he was stock agent for the Union Pacific and Fort Worth—was the party.

Q. Montana was not represented?

412 A. Not in going down; she was represented there.

Q. Was Wyoming represented?

A. She was represented there from a telegram from the State veterinarian we had with us—Mr. Holcombe.

Q. So that the meeting with Secretary Rusk was in the interests in its inception of Wyoming and Colorado and Texas?

A. I think there was eight or ten Texas parties, who had cattle contracted in this portion of the country.

Q. In that described area?

A. Yes, sir; in that portion all the country was there to meet us. I don't know how many, but Mr. Rose was one, and I don't remember the others. They had six or eight thousand head of cattle. I remember their making a statement to Mr. Rusk to make arrangements to move them from some counties in there. I presume that year there was, at the least calculation, seventy-five to one hundred thousand head of cattle moved north in that year in that season. I moved ten or twelve thousand myself.

Q. Then the cattle could not have been moved at all under the regulations of of February, 1891, could they?

A. I think not.

Q. And under the regulations of April, 1891, they could not have been moved and unloaded and been turned loose at Iliff as they were, could they?

A. They could have been moved under the regulations.

Q. Of April, 1891?

A. Yes, sir.

Q. They could have been moved?

A. Yes, sir.

Q. But they could not have been turned loose in the manner in which they were without a modification of that regulation?

A. They could if the sanitary board so wished to.

Q. So, if I understand you, directing your attention now to the regulations of the Secretary of Agriculture of April, 1891,
413 you have previously referred to what you call section 2 or paragraph 2?

A. Yes, sir.

Q. Now, without a modification of that paragraph you could not have shipped these cattle as you did to Iliff, branded and unloaded them upon the range as you did?

A. We could have.

Q. You could not lawfully?

A. We could have at Iliff and turned them loose if the sanitary board had so declared to do it.

Q. Then what do you mean to say that, leaving the regulations of April 23rd in force, the State sanitary board could still have authorized you to do just what you did do?

A. It could; yes, sir; but they didn't do it.

Q. I understand. I am going to ask you that question. Then, that being the case, what necessity was there for your having a modification from Washington?

A. Simply that the board—and in our conversation and while I was president of the board, that I had an interview with Secretary Rusk, we agreed to work in harmony with the Animal Bureau, with his department; but he didn't claim but what when the cattle reached the State of Colorado that, so far as his department was concerned, he could control in any way, shape, or form the handling of the cattle in the State of Colorado; said he could not.

Q. Your position was, as president of the State sanitary board of Colorado, that you could act independently of the authorities at Washington?

A. If we wished to.

Q. But not desiring—

A. After they reached Colorado.

Q. But not desiring, as a State sanitary board, to act in conflict with the Government at Washington, you sought harmony?

A. We did; we would never have attempted it unless we had received it.

Q. So that, as cattlemen representing this defendant company, and likewise as president of the State sanitary board of Colorado, you didn't consider that section or paragraph 2, to which you have previously referred, as binding upon your company if you didn't choose to obey it? Is that right?

A. Not altogether.

Q. In what way isn't it right?

A. We considered, as president of the board and as an individual also, that if we shipped cattle in the State of Colorado contrary to the rules and regulations of the United States department that he had his remedy, and that was the quarantine of the cattle adjacent and around or in the State of Colorado if he desired. He could not govern the handling of these cattle in the State of Colorado after they landed here.

Q. With that modification, as you have explained it, you could have shipped them as you did?

A. Could have shipped them; yes, sir.

Q. Without any modification? Come back to the modification branch. You first met Mr. Pickerel where?

A. Greeley.

Q. Prior to your meeting the Secretary at Galveston?

A. No, sir; afterwards; long afterwards.

Q. The result of your meeting with the Secretary at Galveston was that you people explained to him your desires to make this shipment from Kimble county up north into Colorado, and that you could not as the regulations then stood?

A. I don't think Kimble county was ever mentioned in our con-

versation, or that I desired to ship them. It might have been, but I don't recollect of its having been. We went there to represent the whole portion of this country which included Kimble county. Kimble I don't think was ever mentioned. I knew that I did mention Pecos county.

415 Q. You were there simply speaking for the public good and without reference to your company at the time?

A. I could not say that.

Q. You would not say that?

A. I could not put it quite that straight.

Q. If you would not say that, would you still say that you made no reference whatever in your interview of its being to the interests of your company to make shipments from Kimble county?

A. I don't think I did Kimble. I think I mentioned Pecos. I think I wrote and stated to him, which was endorsed to him by the State veterinarians, as an inducement to have him extend his line, that from Pecos county we had been shipping for four years to Wyoming and by his own bills of health, and that no result had come from any disease whatever. I think I did from Pecos county. I could not say from Kimble county, from the fact that I had never shipped any from Kimble county at that time.

Q. So you don't think you mentioned Kimble county to the Secretary?

A. I don't think I did.

Q. You think that in your interviews you spoke in behalf of the State of Colorado and in the interests of Wyoming, co-operating with Wyoming and Montana?

A. And the interests of twenty or thirty different stockmen who had bought cattle for delivery that spring in this restricted district and for the interests of Texas men also who had interests, as the Western Union Beef Company—

Q. So you did have the Western Union Beef Company in consideration?

A. Yes, sir; oh, yes, sir.

416 Q. After you represented to the Secretary the fact that these regulations of April 23rd were obstacles in the way of the shipment, you persuaded him to say—to consent to a modification, did you?

A. He seemed very willing to do so; he said he would do so.

Q. Did you call his particular attention to the obstacles in the way of that second paragraph or section, or was it merely a general sort of a desire you gentlemen expressed to make shipments north?

A. What conversation have you reference to?

Q. We were now having our interview with Mr. Rusk.

A. That section had not been issued then.

Q. Wasn't this interview in May?

A. No, sir.

Q. When was it?

A. April, with Secretary Rusk.

Q. Yes, sir?

A. April.

Q. It was in April?

A. Yes, sir; the first one.

Q. The first one was in April?

A. Yes, sir; at Galveston.

Q. What time in April was it?

A. Well, I don't remember exactly; I think it was the 10th or 12th—along there, something like that—and then when they came back I had another interview in Denver; short one. I didn't discuss it. In fact, that conversation didn't last a minute or minute and a half or two minutes.

Q. I understand you; I was in error. So that it was in reference to the February regulation that you were having this modification?

A. That was the modification; we went down to get him to order any change corresponding along with—we only represented these three Territories.

Q. And did you outline to the Secretary where you wanted the line changed to or where you wanted them fixed?

A. I think we asked him—I think this was *was* different; at that time we had this map with us, if I remember right, or one similar to it. I think we asked just to make this Colorado and
417 Montana line as you see there—that is the Colorado and Montana line (indicating)—I think we just asked him to allow cattle south or north of that line to be admitted into Colorado and Wyoming under the regulations of the sanitary board of each State, and he agreed to do it. That was my understanding.

Q. The line as established by the regulations of April corresponded with the line that you had submitted to Mr. Rusk, did it?

A. I think it did; I think so.

Q. Well, after you received that promise along in the first of April or so, you had nothing further to do with the Secretary until his return from his western tour?

A. I think not.

Q. And when was that?

A. I think that was somewhere between the 10th and 15th of May.

Q. Before that you had seen Mr. Pickerel?

A. Yes, sir; a few days before.

Q. Where had you seen him?

A. The first time I saw Mr. Pickerel, I am now speaking of myself, was over at Greeley, I think, at my residence; he stayed that night.

Q. How long before you saw the Secretary himself?

A. I think it was the next day or the day following; I am not sure.

Q. And you submitted and explained to him, did you, your interview you had previously with the Secretary at Galveston?

A. I don't think so.

Q. Then in this first interview—

A. I think he knew it.

Q. You think he knew it?

A. Yes, sir.

Q. Did you in this interview with Pickerel talk with him about the matter that you had talked with the Secretary about?

A. I think we did; I think probably we might have done it.

Q. Didn't you mention to him the result of your interviews with the Secretary?

A. I could not say.

418 Q. Well, did you tell him then what you wanted?

A. He told me what he had done. He had seen, I think, the other members of the sanitary board before he saw me. Mr. Pickerel pulled out of his pocket a piece of paper and read it to me what he had done and what he had instructed the sanitary board of Colorado to do.

Q. Did you see the paper?

A. I didn't. Oh, I saw the paper, but I did not see the writing.

Q. You didn't see the writing at all?

A. I didn't. He pulled it out and read it.

Q. So you don't know what was on it except when you heard him read it?

A. No, sir; and what he said he had done. That is all at that time.

Q. Well, now, at that time from what you heard read there was no reference to or modification of this section two or paragraph two, was there?

A. There was; yes, sir.

Q. There was?

A. Yes, sir.

Q. And the next day Harrison came alone—the President came along?

A. I think so.

Q. And did you have any rules and regulations present or which you submitted to the President himself?

A. I didn't see the President except then; met him casually.

Q. Just introduced to him by Judge Symes?

A. No, sir; Senator Teller; I was introduced to him by him. I met him at the Beach hotel, by Senator Teller, and then I met him again in San Antonio, Texas, the next day, but I never discussed anything in regard to this business.

Q. With the President on that occasion?

A. No, sir; didn't discuss it at all.

Q. So that the only discussion you had with the Secretary himself was at Galveston?

A. Yes, sir; except a moment in May.

419 Q. Did I understand you to say that the Secretary and you did not discuss it in May?

A. I didn't; no, sir; except a few words that he said, as I stated before.

Q. Then after this, in June, about the 15th, this shipment was made, wasn't it—these cattle?

A. I shipped some from the 13th to 15th of June, loaded at Quanah.

Q. You were present when they landed at Iliff?

A. No, sir; I didn't—I think not; no; I know I wasn't; but I was before the cattle, the last two trains, was unloaded.

Q. You were there?

A. But I don't think I was there. I came up on the passenger. Whether we went to Greeley or not I am not positive, but I think I went to Greeley and took the passenger and was there before the cattle were branded, all of them.

Q. How long before that had you been over that range south of the Platte?

A. I was there once or twice during the spring. I do not just remember when.

Q. You never made any reckoning of the cattle that you had there prior to the landing of these Texas cattle?

A. Why, no; not say a reckoning account. I was there.

Q. Your only information about any cattle you had there I suppose you got from your foreman or son?

A. No, sir; know it personally; saw them.

Q. If you were not over the range you could not *very* well know.

A. I was on the ranch, and I went to Sterling and over the range in the spring about the round-up, which started in about—I don't remember exactly the time we started, but I should say the 15th or 20th of May. I was there at the J. B. ranch and rode from Sterling down on the south side of the river and saw a good many cattle and saw a good many right below the ranch at that

420 time, but I didn't reckon to count the heads of cattle at all. I gave no instructions to have the cattle moved that year until late in the fall.

Q. How long, Mr. Brush, prior to the 30th of August was it that you learned about Texas fever? I think you stated in your direct examination that you had learned of it prior to that time.

A. I am not positive of the first knowledge I had of it.

Q. Was it from Mr. Mullen's letter or not?

A. I think if he was not the first it was something about the same time. I think my son informed me; but I think when I got the first information I was not at home, and I don't think I was at home when I first got Mr. Mullen's letter.

Q. Mullen wrote you; you don't remember the date?

A. I don't. He stated in the evidence, but I don't—I think I answered him in a very few days, but just the date of that I don't remember. The letter is there which I wrote.

Q. You don't remember, then, how long prior to the 30th of August that it was you heard that the Texas fever had broken out up there?

A. I don't know.

Q. Might it have been a month before?

A. No, sir.

Q. A couple of weeks?

A. Ten days.

Q. Ten days or two weeks?

A. It might have been; yes, sir; might have been.

Q. Where were you two weeks prior to the 30th of August, at home, Greeley?

A. I could not say; I think not. I was home very little that season.

Q. You were at home the 30th of August?

A. About the 30th of August, I think.

Q. How long had you been at home?

A. I could not answer.

Q. Where were you for the two weeks before when you learned about the Texas fever?

A. I might have been home part of the time and might not. I have no recollection to know whether I was at home or not. That year I was seldom at home more than one night in a week, and not often for a month.

Q. What I want to get at is this: So far as you now recollect, you might have been at home when you first learned about the Texas fever?

A. Yes, sir, and I might have been at home during the time, but I don't recollect.

Q. I understand you.

A. But I am satisfied I was not at home any week during that season unless I was sick and I don't remember being sick.

Q. When you give the values of cattle, in reply to Mr. Bryant, they have no reference to the particular cattle of the plaintiffs, but general values or values of cattle generally on that range, I suppose, as you understand them?

A. Well, it was general value. We had some—it had something to do with the values of these cattle; I know these cattle.

Q. You didn't see any of these one hundred and twenty cattle of plaintiff that died?

A. I saw—not that I know of. I saw some dead cattle when I rode in the train, but what they were I don't know.

Q. Going through on the train you saw dead cattle?

A. Yes, sir.

Q. When?

A. I saw some dead cattle in October. When I made that shipment I saw dead cattle; I saw some dead cattle on the side of the hill.

Q. Did you go through on the train during September at all?

A. I don't think I did; I may have. I don't think I did; no, I am satisfied I didn't.

Q. But, then, these cattle that you saw on the train you didn't know whose they were?

A. No, sir.

Q. You didn't know whether they were yours or somebody else?

A. No, sir; I didn't stay to examine them.

422 Q. So that it is true, as I suggested to you, isn't it, that in giving values you don't know anything about the particular cattle of the plaintiff, hundred and twenty head that they lost?

A. Except I know that class of cattle; the class of cows they had;

the class of steers they had—Texas steers—and the class of three-year-old and the cows they had, because I had seen the general class.

Q. Mr. Lamb testified that he was down there on the 23rd of August. Were you there then?

A. I was not. I didn't see him at that time.

Q. He also stated he was there three days afterwards.

A. Three days afterwards?

Q. Did you see him again?

A. Three days afterwards?

Q. That would be the 26th of August. He said he was there the 26th of August—a second visit.

A. It was the second visit that I saw him, and I wouldn't be positive as to the dates, but it was the second visit that he had been there, and he spoke to me about being down there before. I think if he was there he was at other places. I met him at Sterling, but I didn't go any further than Sterling.

Q. Were you a member of the State legislature at any time?

A. I was.

Q. What time?

A. I think '71. I was there the year that Senator Hill was elected United States Senator, and I think the year before that.

Q. The State was not a State until '76.

A. I was, I think, if my memory serves me right—that I was in the last territorial and the first State legislature. I was there two years, I think.

Redirect examination:

Q. Mr. Brush, you say you had some cattle that were south
423 of this quarantine line?

A. Yes, sir.

Q. You didn't make any attempt to get these counties included?

A. No, sir; not in connection with this matter.

Q. Judge Kingsley asked you this?

A. They were to be driven.

Q. That is, they were to be driven up to the quarantine for ninety days?

A. Yes, sir.

Q. Judge Kingsley asked you this question. From what you heard read by Mr. Pickerel, section 2 was not modified, and you stated that it was modified. State what you heard read to you by Mr. Pickerel.

A. Section two of act, as near as I can recollect—

Objection by plaintiffs.

A. —of February 29th shall not apply to the State of Colorado, Wyoming, and Montana. Signed. I didn't see it.

Mr. KINGSLEY: He didn't read anything further. That is all right.

WITNESS: He said he was special agent and showed me his card.

Mr. KINGSLEY: That is all you heard read, as you have said?

A. I don't know that it is all.

Mr. KINGSLEY: State all you heard read.

A. That is all I can recollect, and he signed it. He read blank Pickerel, special agent.

Mr. KINGSLEY: He read that?

A. Yes, sir; said what he had left; said this was a copy of what he left at Wyoming and the same thing, except that he desired to have an interview with Secretary Rusk before he done so, which he informed me that he would be here in Denver the next day; I think — was the next day.

Motion by plaintiffs to strike out the last answer of the witness. Motion denied; to which ruling of the court the plaintiffs duly excepted.

424-440 (Mr. BRYANT, resumed:)

Q. Secretary Rusk told you that they could not interfere with cattle after they got in Colorado; is that what he said?

A. Yes, sir.

Q. What did he say in regard to that?

A. He said while he desired very much to have us to co-operate with him, recognizing the fact that if he allowed these cattle to be shipped into the State, when they were turned loose that the power of the Government ceased, and the power of the State of Colorado at that time took hold, but that if we didn't obey the instructions he had his remedy by quarantining the State of Colorado from any cattle being shipped on the market.

Q. That is, he could prevent you from shipping any cattle out?

A. Yes, sir; but after the cattle was in—and he also stated it was not his intention to restrict these cattle in the State of Wyoming from running at large, but that the chief of the Animal Bureau had followed the proper methods years before.

Q. In regard to the value of these cattle that you gave, are you acquainted with the Mullen and McPhee cattle?

A. I am tolerably well acquainted with them.

The COURT: He testified to that before.

Q. I want to know if the value had reference to their cattle.

The COURT: He testified to that.

Q. Do you want to state anything else that you know of that you haven't testified to?

(No answer.)

* * * * *

441 Said record offered in evidence by defendant.

Objection by plaintiffs, as said record does not appear to have been issued by authority of the Government, and appears to be in conflict with the rules and regulations of the department in Washington.

The COURT: I do not think there is any evidence to show that Mr. Pickerel had any authority to rescind or modify the rule. Secretary Rusk had authority to do it, but under this statute he is re-

quired to prepare it in writing and certify it to the executive of the State; that he does not appear to have done.

Mr. BRYANT: The other rules never were.

The COURT: They may not have been; I don't know; but that is a provision of the statute under which they are authorized to be promulgated. He has to prepare them and certify them to the executive of the State. I think it is required to be in writing and placed on file with the executive, so everybody can see and govern himself accordingly. That is a provision of the act of Congress under which the rules are authorized to be made.

Objection sustained.

Mr. BRYANT: Then your honor holds that—of course, we may not be able to show it was ever filed with the governor of the State; I do not think we can. I am not certain about that.

442 The COURT: That is a provision of the statute.

Mr. BRYANT: Then, if we cannot do that, we cannot introduce it. We may be able to show by Mr. Brush that Secretary Rusk did mention Mr. Pickerel's name and ratified this particular order, but we cannot show that it was placed on file with the executive.

The COURT: All that I hold now is that no authority is shown in Mr. Pickerel to in any manner modify the rule; so this is excluded.

Mr. BRYANT: I will offer to prove by this time by Mr. Brush that Secretary Rusk, in the conversation had with Judge Symes referred to in the testimony of witness Mr. Brush, said that he had sent Mr. Watkins Pickerel out to Colorado to investigate the matter and had seen this order and ratified it and made the modification in the order of April 23rd, which is as follows, to wit:

"Section two of Sec. Rusk's order of April 23rd shall only apply to trails and ranges outside of Colorado, Wyoming, and Montana. The balance of the section shall be enforced.

(Signed)

WATKINS PICKEREL,
Special Agent."

The COURT: As I understand, Mr. Brush has already given the conversation that took place with Secretary Rusk in reference to this matter.

Mr. BRYANT: He tells me that he did say something about Pickerel at that time.

The COURT: He may state all that he said, and I will rule after the evidence is all in. I do not want an offer made where the evidence can now be supplied.

(The testimony of Mr. Brush in regard to his conversation with Secretary Rusk — thereupon read by the reporter.)

443 Thereupon defendant asks leave to recall Mr. Brush to testify further in reference to said conversation.

J. L. BRUSH, being recalled by the defendant, testified as follows :

Direct examination :

Q. Was there anything said in that—please state what was said, if anything, by Secretary Rusk in your conversation with him in Denver concerning Watkins Pickerel.

A. Yes, sir ; Mr. Pickerel's name was mentioned.

Q. What was said concerning Mr. Pickerel?

Objection by plaintiffs as incompetent, immaterial, and irrelevant, as matter not competent to be probed by conversation or oral testimony.

The COURT: This, gentlemen of the jury, is not to be considered by you at all. This is simply addressed to the court. Now I will hear what Mr. Brush has to say.

To which plaintiffs duly excepted.

Examination by the COURT :

Q. State what conversation you had with Mr. Rusk at that time, as near as you can remember it, Mr. Brush.

A. At that time he stated Mr. Watkins Pickerel, his agent, had been to see him at the Metropole that day and had shown him the modification—

The COURT: How do you know that?

A. Secretary Rusk said so. He had shown him the modification of section two in his proclamation ; that he endorsed it, and turned to me and asked me if that was satisfactory to the sanitary board of Colorado. I thought I had given in that testimony before, but I see I have not—

Q. The certificate made by Mr. Pickerel was not present at the time that you had this conversation with the Secretary?

A. It was not.

444 & 445 Q. He said that Mr. Pickerel had been to see him and shown him what he had done?

A. He did.

Q. Then what further did he say?

A. He asked me if, either he or Mr. Symes, I would not say which one, if I had seen Mr. Pickerel. I told him I had, and had seen the modification.

Objection by plaintiffs sustained ; to which ruling defendant excepted.

* * * * *

446 Defendant offers in evidence the original complaint and the amended complaint without objection, the same being as set forth in the transcript of the record herein at folios —.

Defendant offers in evidence Exhibit "4" without objection, which is in words and figures following, to wit :

Ex. "4."

Circular D-197.

Regulations governing the admission of southern cattle into Colorado, Wyoming, Montana, Nebraska, Kansas, and New Mexico, together with a map showing the location of the quarantine lines of these States and Territories, and also the Government fever line, as fixed by the Department of Agriculture.

Published by the Union Pacific Railway system, with the consent and official approval of the veterinary sanitary authorities of New Mexico, Colorado, Wyoming, Montana, Kansas, and Nebraska.

W. V. Newlin, G. F. A., Ft. Worth & Denver City R'y, Fort Worth, Texas.

Fred Wild, Jr., A. G. F. A., Union Pacific system, Denver, Colo.

J. A. Munroe, G. F. A., Union Pacific system, Omaha, Nebraska.

C. S. Mellen, gen'l traffic m'g'r, Union Pacific system, Omaha, Nebraska.

F. B. Whitney, first A. G. F. A., Union Pacific system, Omaha, Nebraska.

To shippers, cattlemen generally, and all others interested :

Following a custom which has been in practice since the completion of the Texas Panhandle route, now a division of this system, the Union Pacific Company presents, in this pamphlet, the revised quarantine regulations of various States and Territories, as well as those of the Federal authorities, affecting the movement of cattle from certain sections of Texas, which are to be enforced during the current year. In addition to the regulations, the several "dead" or "fever" lines, as described by the authorities named, are shown upon a map specially prepared for this purpose. Much time, care and expense have been devoted to this compilation, and it is hoped by the company that the publication will prove of convenience to all shippers.

It will be noted that Colorado, Wyoming and Montana have this year agreed upon joint regulations and inspection to cover the importation of cattle into these States; and also that changes have been made from the rules separately enforced last season, which promise to curtail the expense of a compliance with the regulations to a minimum. One inspection only will be required, and as this will be made before the cattle are loaded upon the cars, the chances of delay *en route*, for purposes of inspection, are entirely cut out. The usual affidavits, to establish the locality from which the stock comes, will be exacted. These must be presented to the inspector at the time the cattle are examined, when, all proof being satisfactory, a certificate will be issued, upon which the stock will be forwarded to its destination without farther inspection; and will be permitted to stop for feed, water and rest at any intermediate point which may best suit the convenience of the shipper or carrier.

Those who are particularly interested will observe that Wyoming

still insists upon an examination of affidavits at Cheyenne, for purposes of identification. To insure a compliance with this requisite, it has been determined to require shippers to present the certificate of inspection and the copy of the original affidavit required for each train, to the agent at the loading point, who will take up the same, attach to the waybills and forward, with the stock, by conductors. This will insure the presence of the papers with the stock at all times, and will absolutely shut out the possibility of delay at Cheyenne for lack of proofs to establish its identity. All agents of this company will, therefore, be instructed to decline to receive or forward stock to a northern destination where the papers described are not offered in evidence of their eligibility. Through the adoption of this method, it is expected that the detentions and harassments necessarily imposed heretofore by reason of the enforcement of separate regulations, cannot hereafter occur; and we, with all shippers, earnestly hope that this expectation may be realized.

A reference to the accompanying map will disclose the fact that certain extensions of the lines of this company have been made, and also connections with other lines, since the close of last season's business, which will enable us to receive cattle farther south and deliver them farther north than we have heretofore been able to reach. The extension of the Wichita Valley line, which makes a connection with the Fort Worth & Denver City, at Wichita falls, gives us access to Baylor, a "free" county in Texas, and first-class accommodations have been provided at Seymour for handling cattle from that point. Situated on the old trail, as it is, leading from southwestern counties to Panhandle points on our line, and in the "strip," and being the first loading point reached by the drives, it should attain popularity at once as a place of shipment.

Through the extension of the Cheyenne & Northern branch from Wendover to a junction with the Fremont, Elkhorn & Missouri Valley railroad, at Orrin Junction, we can reach all Black Hills points as far north as Minnesela, and as far west as Caspar.

Through tariffs, covering rates between all southern and northern points, will soon be issued, and through billing provided for.

Again referring to the map: The location of all feed yards upon the through lines has been indicated by means of a small square (□), and as these yards have been overhauled, extended, and new ones provided in some places, it is believed that in this particular, ample provision has been made.

Guided by past experience, and desiring to promote and foster this traffic to the utmost extent possible, this company has increased its equipment fully forty per cent. over that which was available in this movement last season. This enlargement, in addition to the proportion of equipment which will be furnished by our connections, in the event that it is required, should place us in shape to promptly fill all orders filed with us for cars.

The question of power has not been overlooked by the management. Important improvements and additions have been made to this department, and it is honestly thought that every precaution

has been taken to move this business—as it should be done—safely and expeditiously.

With these statements, and the further closing assurance that every effort will be made to faithfully serve you, should you give us your business, we solicit your patronage.

C. L. WARE,

Henrietta, Texas.

J. C. LEARY,

Denver, Colo.

Colorado, Wyoming, and Montana Quarantine Regulations for 1891.

The following regulations will govern the admission of southern cattle into Colorado, Wyoming and Montana during the year 1891, to wit:

First. All cattle coming in whole or in part from south of the thirty-sixth parallel of north latitude, between the last day of March and the first day of November, must show by affidavit of two responsible parties, whose reliability shall be certified to by the clerk of a county or of a district court:

(a.) Name and post-office address of the owner, consignor and consignee;

(b.) The brand or brands on all of said cattle;

(c.) The county or counties in which the said cattle have been held during the preceding ninety (90) days, and the total number demanding entry.

Second. Each train-load (or herd, if driven,) must be accompanied by a certified copy of the original affidavit.

Third. Unless satisfactory proof is presented to the State veterinarians of Colorado, Wyoming and Montana, or to their authorized deputies, that cattle have been at least ninety (90) days north of the thirty-sixth parallel of north latitude, or west of a line drawn from a point where the thirty-sixth parallel of north latitude crosses the Arkansas river, southwest to the northeast corner of Wilbarger county, Texas; thence south along the east lines of Wilbarger, Baylor, Throckmerton and Shackelford counties; thence west along the south line of Shackelford county; thence south along the east lines of Taylor, Ruess, Concho, Menard and Kimble counties; thence west along the south lines of Kimble, Sutton and Crockett counties; thence south along the east line of Pecos county to the Rio Grande river, they will be deemed liable to convey Texas or splenic fever, and will be held in quarantine at the risk and expense of the owner for not more than ninety (90) days.

Fourth. All southern cattle, to be moved by rail, and destined for Colorado, Wyoming and Montana, will be inspected before they are loaded at the original point of shipment; and if they are found to be free from disease, and all of these regulations have been complied with, a certificate will be issued entitling them to the freedom of these States.

Fifth. Any southern cattle found at any point in Colorado, Wyoming or Montana, not branded as set forth in the original affidavit, or that have not complied with these regulations, will be held in

quarantine, at the risk and expense of the owner, until they are deemed safe to mingle with native northern cattle.

Sixth. Cattle coming by trail will be inspected at the usual place, near Point of Rocks.

Seventh. To defray the expenses of inspection, a fee of one and one-half cents per head will be charged, payable before a certificate is issued.

Blank affidavits will be furnished upon application to either of the undersigned.

CHAS. G. LAMB,
State Veterinarian of Colorado.
A. A. HOLCOMBE,
State Veterinarian of Wyoming.
HERBERT HOLLOWAY, V. S.,
State Veterinarian of Montana.

The second biennial report of the State veterinarian and board of live stock agents to his excellency, the governor of Nebraska, contains the following, relating to the movement of southern cattle into Nebraska:

Whereas, experience has demonstrated that all cattle shipped from the States of Texas, Arkansas, Louisiana, Alabama, Mississippi, Florida, Georgia, Tennessee, North Carolina, South Carolina and Indian Territory, into or through the State of Nebraska, after the first day of March or before the first day of November, are liable to convey Texas or splenic fever to our native cattle; therefore, be it

Resolved, That the governor prohibit, by proclamation, the introduction into or through the State of Nebraska of all cattle that have been shipped all or any part of the way from the States of Texas, Arkansas, Louisiana, Alabama, Mississippi, Florida, Georgia, Tennessee, North or South Carolina and Indian Territory, during the months of March, April, May, June, July, August, September and October.

The same is respectfully submitted,

J. C. BIRNEY, *Chairman.*
G. W. BARNHART.
W. W. ABBEY.
J. GERTH, JR., *Secretary.*

Now, therefore, in accordance with the above recommendation and by virtue of the authority vested in me, I, John M. Thayer, governor of the State of Nebraska, do hereby issue this, my proclamation, establishing a quarantine against all the States, districts, counties and Territories named in the foregoing resolutions, and prohibiting the importation into this State of all cattle from all or either of the above-named places.

This proclamation shall take effect and be in force from and after the first day of February next, and the quarantine so established and declared will be enforced by the live stock agents and the State veterinarian.

On the taking effect of the proclamation, all previous proclamations of the State will stand revoked.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State of Nebraska.

Done at Lincoln, this eighteenth day of January, in the year of our Lord, one thousand eight hundred and eighty-eight.

By the governor.

[SEAL.]

JOHN M. THAYER.

The foregoing was amended by proclamation by the governor, made June 18, 1888, so as to permit the importation into Nebraska of beef cattle from Texas and the Indian Territory, when destined for immediate slaughter within the State, under rules and regulations prescribed by the State board of live stock agents. Following are the rules:

First. Beef cattle may be imported from the State of Texas and Indian Territory, where they are destined for immediate slaughter in this State, in which case the said cattle shall not be driven over public highways or commons where cattle are permitted to range at large.

Second. Such cattle, while in transit through this State, may be unloaded for the necessary time required in feeding and watering in regular railroad shipping pens or feed yards, erected and set apart for such cattle, and into which no native cattle are permitted to enter.

Third. Upon the arrival of such cattle at their destination, they shall be unloaded in cattle chutes, alleys and pens especially prepared for them, and shall not be mixed with any other cattle; nor shall native cattle be permitted to enter these pens; nor shall native cattle be driven through alleys over which such cattle have been driven.

Fourth. All cars in which such cattle have been shipped, before they are again used for the shipment of cattle, and before they are taken out of the railroad yards, shall be cleansed by the railroad companies, by removing all excrement matter, and depositing same where cattle are not permitted to range at large.

Fifth. The foregoing rules and regulations shall be in force beginning with the first day of March, and ending the first day of November in each year.

Rules and Regulations of the Cattle Sanitary Board of New Mexico.

1. It is hereby ordered, that until further provided, no one will be employed to inspect cattle, unless he is known to be a practical cattle raiser and owner in the Territory and directly interested in the cattle industry, except at places where persons of that class cannot be found willing to serve. All inspectors are required to observe the strictest economy in incurring expenditures, and are enjoined to avoid all unnecessary and unreasonable expenses in the performance of their duties.

Whenever it shall become necessary to seize and quarantine cattle

that have been driven or transported into the Territory, in violation of the law, any inspector for that purpose shall call to his aid a sufficient number of persons, accustomed to handling cattle, as may be necessary for that purpose; in which case all expenses of inspection and quarantine are to be borne by the owner of the cattle, and for the payment of which there will be a lien on the cattle so seized.

2. From the fifteenth day of March to the fifteenth day of November of each year, all cattle before being imported into New Mexico south and east of a line commencing at the northwest corner of the county of Wichita; thence running due south along the western line of Wichita and Archer counties to the northeastern corner of Throckmorton county; thence due west to the northwest corner of said county; thence due south to the southwest corner of Throckmorton county; thence due west to the northwest corner of Shackelford county; thence due south to the southwest corner of said county; thence due west to the northwest corner of Taylor county; thence along the north line of Nolan and Mitchell counties to the northwest corner of said Mitchell county; thence due west to the southwest corner of said Mitchell county; thence due west along the south line of the counties of Howard, Martin and Andrews, to a point where the southeast corner of the Territory of New Mexico and the southwest corner of Andrews county, in the State of Texas, meet; thence due west along the south boundary line of New Mexico to a point where the monuments marking the boundaries between the State of Texas, the State of Chihuahua, in the Republic of Mexico, and the Territory of New Mexico, and erected by the United States boundary commission, stand and are in place at the date of the enactment of this law, and more particularly the counties of El Paso, Presidio, Pecos, Tom Green, Crockett, Mitchell, Shackelford, Throckmorton, Archer and Wichita, in the State of Texas, and all the counties east and south of the counties hereinbefore mentioned, and situated in the aforesaid State of Texas; also, from that part of the Republic of Mexico lying north and east of the Mexican Central railway to the 26th degree of latitude, must be inspected and an investigation made by our inspector, or other authorized person, for the purpose of determining whether any of such cattle have or have not come from any proscribed districts; and cattle from any locality desiring to be imported into the Territory of New Mexico, within the aforementioned period of time, must submit to an inspection, nor shall they be admitted into the Territory until a written or printed permit is issued to the owner or importer thereof by or under the authority of the board.

In conducting such investigation the inspector will bear in mind that the object of inspection as to the cattle disease known as Texas fever, is not to determine whether the cattle are infected with that disease, which cannot be determined by an inspection, but to determine whether the cattle, or any of them, are or are not from any part of the proscribed districts of Texas and the Republic of Mexico.

3. If, upon investigation, it shall be ascertained that the cattle so inspected have not come from the aforesaid proscribed districts of Texas and the Republic of Mexico, or any part thereof, the in-

spector before whom the investigation took place, will give to the person in charge of the cattle a permit in writing or print, or partly in writing and partly in print, and signed by the inspector, to pass such cattle into the Territory to their destination therein, or to pass the same through the Territory, when their destination shall be beyond the limits of the Territory; otherwise the inspector will refuse such permit, unless the cattle are to be transported entirely through the Territory of New Mexico by rail, under the conditions and restrictions prescribed by the quarantine law.

5. Cattle to be inspected, as above required, must be stopped before entering the Territory, at or within a reasonable distance of either or any of the following points of entry, for the purpose of convenient inspection, and until otherwise provided and notice published, no permits will be granted to pass cattle into or through the Territory, except at or near such points, viz: El Paso, Texas, the point where the Pecos river crosses the line between the Territory of New Mexico and the State of Texas; the point where the Fort Sumner and Texas road crosses the line between said Territory and State; the point where the Canadian river crosses the line between such Territory and State, at Clayton, on the Denver & Fort Worth railway, and any part of the line between the Territory of New Mexico and the State of Chihuahua, in the Republic of Mexico, within 200 miles of El Paso, aforesaid; *provided, however*, if the owner of the cattle to be inspected shall so elect and inform the proper inspector, an inspection may be made and a permit in like manner may be granted to pass cattle into the Territory at any other point upon the boundary line designated by the importer, upon his paying the necessary expenses of inspection and investigation at the time of the application for said inspection.

6. Inspectors will not go beyond the boundary line of the Territory to inspect cattle, upon the application of the owner or agent in charge, except for the purpose of viewing the cattle and taking a description of them.

All oaths to witnesses must be administered, and all necessary testimony taken, *within the Territory*, and for this purpose the proper inspector will require the importer of cattle to be inspected, to furnish, within the Territory, all the testimony which he may desire to offer, and which may be required for the purpose of inspection and investigation, to determine whether his cattle have or have not come from the aforesaid proscribed districts in the State of Texas and the Republic of Mexico.

7. All testimony taken before any inspector, in any such investigation, must be reduced to writing and reported to the cattle sanitary board.

8. Any person having in charge any cattle destined for introduction into the Territory, and required to be inspected, as above provided, may make application to the inspector designated at a place nearest to any of the above-mentioned points of entry, where he desires to import his cattle into the Territory, for an inspection of his cattle, and to make an investigation for the purpose aforesaid. Such application must be in writing, and specify the number of

cattle to be inspected, the owner's name, the place they came from and their destination, also the place where they have been stopped for inspection, and the distance, as near as known, to the nearest of any of the above-mentioned points of entry, where, or near which, the importer intends to enter the Territory with his cattle; also specifying the time at which he desires the inspection to take place, which must be not less than ten days from the time the application is made; and said inspector shall proceed at once to go to the point of inspection, or as soon as his duties will permit, and make, or cause to be made, the required inspection and investigation, and grant or refuse a permit, as above provided.

9. All inspectors are hereby required to inspect under the governor's proclamation relating to pleuro-pneumonia as well as under the quarantine law respecting Texas fever, and guard against the entry of any cattle covered by such proclamation, except at the points and under the conditions and restrictions specified therein.

10. Cattle to be inspected as above required must be stopped before entering the Territory, at or within a reasonable distance of either or any of the following points of entry, for the purpose of convenient inspection, and until otherwise provided, and notice published, no permits will be granted to pass cattle into or through the Territory, except at or near such points, viz:

Any part of the line between New Mexico and the Republic of Mexico within two hundred miles of the city of El Paso, including the line between New Mexico and Arizona up to the point where the Southern Pacific railway crosses the boundary line, which is hereby designated as inspection district No. 1; R. H. Hopper, Hillsboro, N. M., inspector.

Any part of the line between New Mexico and the State of Texas in the vicinity of El Paso, in that State, which is designated as inspection district No. 2, Phillip Mothersill, Engle, N. M., inspector.

The point at or near which the Pecos river crosses the line between New Mexico and the State of Texas; designated as inspection district No. 3; W. E. Owens, Lookout, N. M., inspector.

The point at or near which the Fort Sumner and Texas road crosses the line between New Mexico and the State of Texas; designated as inspection district No. 4; R. C. Temple, Fort Sumner, N. M., inspector.

The point at or near which the Canadian river crosses the line between New Mexico and the State of Texas; designated as inspection district No. 5; R. L. M. Ross, Las Vegas, N. M., inspector.

At Clayton, on the Denver, Fort Worth & Texas railway and the point where the A. T. & S. F. railway crosses the line between New Mexico and the State of Colorado, in the vicinity of Raton, N. M., designated as inspection district No. 6; G. E. Lyon, Raton, N. M., inspector.

The point where the Denver & Rio Grande railway crosses the New Mexico line, and extending west and south on the boundary line to where the Atlantic & Pacific railway crosses the line of New Mexico; designated as inspection district No. 7. Applications for

inspection in this district are to be made to the office of the cattle sanitary board at Las Vegas, N. M.

11. Until further notice the inspectors will make all reports to R. F. Hardy, secretary, Las Vegas, N. M. It is requested that all parties knowing of any violations of the quarantine laws will report the same to any member of the cattle sanitary board.

J. E. SAINT, *President*;

RICHARD HUDSON,

S. E. BOOTH,

Members Cattle Sanitary Board.

Kansas Quarantine Rules and Regulations.

OFFICE LIVE STOCK SANITARY COMMISSION,

TOPEKA, KANSAS, April 22, 1890.

To whom it may concern :

From and after this date, and until further notice, all cattle coming to Kansas from that portion of New York lying south of the north line of the State of Connecticut, all of Pennsylvania, New Jersey, Delaware, Maryland, District of Columbia, Virginia, West Virginia and the Dominion of Canada will be required to enter the State at Kansas City, where they will be held in quarantine, at the risk and expense of the owner, for a period of ninety days, and until they shall receive a bill of health signed by the State veterinarian of Kansas.

Cattle from all other districts may enter the State, provided the shipper satisfies the State inspector at Kansas City that they are healthy, and have not been exposed to any contagious or infectious disease.

1st. All cattle coming into the State from or through the Kansas City stock yards will be required to have a permit from the State inspector stationed at said stock yards.

2d. Cattle from south of the south line of the State of Kansas, that have been kept, since the first day of December of the previous year, west of the east line of the Indian Territory, and north of the 36th parallel of north latitude, or west of the 21st meridian of longitude west from Washington, D. C., and north of the 34th parallel of north latitude, may be admitted to the State of Kansas under the following rules:

3d. That the owner or person in charge shall first show, by affidavit of two reputable, disinterested persons, that they are acquainted with the cattle sought to be shipped or driven, and that they have known said cattle since the first day of December last preceding, and that said cattle have been kept in the territory described above, and have not come in contact with any southern cattle, and give number and kind of cattle, and of what brand or brands. And upon the presentation of such affidavits, if satisfactory to this board, or the State inspector, permits will be issued to ship or drive such cattle to any point in the State of Kansas.

4th. Inspectors will be appointed for the State at the following points: One at Chetopa, for Baxter Springs and Chetopa; head-

quarters at Chetopa. One at Coffeyville, for Coffeyville, Caney and Elgin; headquarters at Coffeyville. One at Arkansas City; headquarters at Arkansas City. One at Caldwell, for Caldwell and Hunnewell; headquarters at Caldwell. Address the above points, in care of R. R. agent.

5th. All railroads, express and other transportation companies, or individuals, are forbidden to transport or drive any cattle into this State, except in compliance with the foregoing rules and regulations, under the penalties of the following statute:

(*Extract from Chap. 2, Special Session Laws of 1884.*)

"SEC. 21. Except as otherwise provided in this act, any person who shall violate, disregard or evade, or attempt to violate, disregard or evade, any of the provisions of this act, or who shall violate, disregard or evade, or attempt to violate, disregard or evade, any of the rules, regulations, orders or directions of the live stock sanitary commission, establishing and governing quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five thousand dollars."

By order of the live stock sanitary commission, State of Kansas.

W. H. GOING, *Secretary.*

STATE OF KANSAS:

OFFICE OF LIVE STOCK SANITARY COMMISSION,
TOPEKA, KANSAS, July 1, 1890.

To all railway, live-stock car, express, or transportation companies doing the business of shipping or transporting cattle in the State of Kansas:

It is hereby ordered, that on and after this date all cars, of whatsoever description, that are used or offered to be loaded with native northern cattle for transportation in the State of Kansas, that said cars first before being loaded with native cattle *be thoroughly cleaned and disinfected*, as follows: All litter and old bedding to be removed, and, in the case of stable cars, all hay left in the racks from former shipments must be removed, and the watering troughs cleansed. The floor and walls of the cars must be washed, until clean, with water; then disinfect the car by saturating the walls and floor with a solution of 4 oz. of chloride of lime to 1 gallon of water, using at least 4 gallons of this preparation per car.

All stock-yard companies doing business in the State of Kansas are hereby ordered not to load native northern cattle into any cars that have not first been cleaned and disinfected according to the above order.

This order will be enforced under the provisions of section 8, chapter II, Laws of Special Session 1884, which is as follows:

"SEC. 8. It shall be the duty of the railway corporations doing business in this State to cleanse and disinfect the cars used by them in transporting stock in this State, at such times and places as the

commission may designate, whenever in the opinion of the commission any such order may be necessary to prevent the spread of infectious or contagious diseases. Any such corporation violating any of the provisions of this section shall be liable to a penalty of five hundred dollars for each offense, to be recovered in a civil action to be prosecuted under the direction of the attorney general, in the name of the State of Kansas."

By order of the live stock sanitary commission, State of Kansas.
W. H. GOING, *Secretary*.

Regulations Concerning Cattle Transportation.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., Feb. 5, 1891.

To the managers and agents of railroad and transportation companies of the United States, stockmen, and others:

In accordance with section 7, of the act of Congress, approved May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," and of the act of Congress, approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1891, you are hereby notified that a contagious and infectious disease known as splenetic or southern fever exists among cattle in the following-described area of the United States:

All that country lying east and south of a line commencing at the southeast corner of the Territory of New Mexico, thence running northerly along the eastern boundary of New Mexico to the southwestern corner of the county of Cochran, State of Texas, thence easterly along the southern boundaries of the counties of Cochran, Hockley, Lubbock, Crosby, Dickens and King to the one hundredth meridian of longitude; thence northerly along said one hundredth meridian to the southern boundary of the State of Kansas; thence easterly along the southern boundary of the State of Kansas to the northeast corner of the Indian Territory; thence southerly along the eastern boundary of the Indian Territory to the southwestern corner of the State of Missouri; thence easterly along the southern boundaries of the State of Missouri and the State of Kentucky and the State of Virginia to a point where said boundary is intersected by the Blue Ridge mountains; thence in a northeasterly direction, following said Blue Ridge mountains, to the southwestern corner of the county of Madison, State of Virginia; thence easterly along the southern boundaries of the counties of Madison, Culpeper and Stafford; thence northerly along the eastern boundary of Stafford county to the Potomac river; thence, following the Potomac river, southerly to the Chesapeake bay; thence easterly along the southern boundary of Maryland to the Atlantic ocean.

From the fifteenth day of February to the first day of December, 1891, no cattle are to be transported from said area to any portion

of the United States north or west of the above-described line, except in accordance with the following regulations :

First. When any cattle in course of transportation from said area are unloaded north or west of this line to be fed or watered, the places where said cattle are to be so fed or watered shall be set apart, and no other cattle shall be admitted thereto.

Second. On unloading said cattle at their points of destination, pens shall be set apart to receive them, and no other cattle shall be admitted to said pens; and the regulations relating to the movement of Texas cattle, prescribed by the cattle sanitary officers of the State where unloaded, shall be carefully observed. The cars that have carried said stock shall be cleansed and disinfected before they are again used to transport, store or shelter animals or merchandise.

Third. Whenever any cattle that have come from said area shall be reshipped from any of the points at which they have been unloaded to other points of destination, the car carrying said animals shall bear a placard stating that said car contains southern cattle, and each of the waybills of said shipment shall have a note upon its face with a similar statement. At whatever point these cattle are unloaded, they shall be placed in separate pens, to which no other cattle shall be admitted.

Fourth. The cars used to transport such animals, and the pens in which they are fed and watered, and the pens set apart for their reception at points of destination, shall be disinfected in the following manner :

(a.) Remove all litter and manure. This litter and manure may be disinfected by mixing it with lime, diluted sulphuric acid, or, if not disinfected, it may be stored where no cattle can come in contact with it until after December first.

(b.) Wash the cars and the feeding and watering troughs with water until clean.

(c.) Saturate the walls and floors of the cars and the fencing, troughs and chutes of the pens, with a solution made by dissolving four ounces of chloride of lime to each gallon of water. Or, disinfect the cars with a jet of steam under a pressure of not less than fifty pounds to the square inch.

The losses resulting yearly to the owners of susceptible cattle, both in the interstate and export trade, by the contraction of this disease from exposure in unclean and infected cars and pens, and by means of the manure carried in unclean cars from place to place, and the threatened prohibition of our export trade by foreign governments because of the occurrence of this disease, have become a matter of grave and serious concern to the cattle industry of the United States. It is absolutely essential, therefore, that this cattle industry should be protected as far as possible by separating the dangerous cattle and by the adoption of efficient methods of disinfection.

A rigid compliance with the above regulations will insure comparative safety to northern cattle and render it unnecessary to adopt a more stringent regulation, such as the absolute prohibition of the movement of southern cattle, except for slaughter, during the time of year that this disease is fatal.

Inspectors will be instructed to see that disinfection is properly done, and it is hoped that transportation companies will promptly put in operation the above methods.

Very respectfully,

J. M. RUSK, *Secretary.*

(Here follows map.)

447 Defendant reads in evidence the deposition of Cowsert, which is attached to the transcript of the record herein.

Defendant reads in evidence Exhibits "1" and "5," which are in the words and figures following, to wit:

(Letter head of Mullen & McPhee, dealers in land and cattle.)

DENVER, COLO., 2, 20, 1892.

Judge Symes, Denver, Colo.

DEAR SIR: Enclosed find sworn statement of cattle lost by Texas ver:

S. R. Matthews.....	33
W. J. Powell	83

Total..... 116 hd., a. \$2,388.00
which is presented to you in accordance to the expressed wish of J. L. Brush.

Please attend to this for the W. U. Beef Co. as soon as convenient and oblige,

Respectfully yours,
(Exhibit 5) attached.

McPHEE & MULLEN.

DEFENDANT'S EXHIBIT "5."

STERLING, COLO., *Febr'y* 16, '92.

Western Union Land & Cattle Co. to McPhee & Mullen.

448

5 bulls	35.00	175.00
59 cows (3 to 8)	20.00	1,180.00
5 steers	17.00	2 years	85.00
4 "	25.00	3 "	100.00
3 "	30.00	4 "	90.00
5 heifers.....	17.00	2 "	85.00
1 steer (Texas)	3	3 "	17.00
1 " "	4	4 "	20.00
2 "	12.00	1 "	24.00
1 bull	35.00	35.00
3 steers, 12.....	12.00	1 "	36.00
4 heifers.....	12.00	1 "	48.00
1 "	17.00	2 "	34.00
18 cows (3 to 8)	20.00	360.00
1 steer	2	2 "	17.00
2 "	25.00	3 "	50.00
1	2	4 "	30.00

116 total..... 2,388.00

(Separate sheet.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

STERLING, COLO., *Febr'y* 16, '92.

To whom it may concern :

This is to certify that the following cattle, owned by McPhee & Mullen, were found dead from Texas fever; same counted by me.

1 bull, graded,	4 years.
13 cows, American,	3 to 8 years.
2 steers,	2 years.
2 "	3 "
1 "	3 "
1 "	4 "
1 "	2 "
1 " Texas,	3 "
1 " "	4 "
2 " American,	4 "
1 " "	3 "
4 bulls, grade.	
46 cows, American,	3 to 8 "
5 heifers,	2 " "

83 total.

W. J. POWELL.

[On the margin:] Branded



Subscribed and sworn to before me this 16th day of February, 1892.

[NOTARIAL SEAL.]

S. A. BURKE,
Notary Public for Logan County, Colo.

My commission expires Aug. 5th, 1893.

449 (To whom it may concern :)

STERLING, COLO., *Febr'y* 16, 1892.

This is to certify that the following cattle, owned by McPhee & Mullen, were found dead by me of Texas fever :

2 steers, American,	1 yr.
1 bull,	graded, 6 "
3 steers,	1 "
4 heifers,	1 "
1 "	2 "
15 cows,	3 to 8 yr.
1 steer,	2 yr.
2 "	3 "
1 " "	4 "

12 cows,	6 "
11 " "	6.

33 total.

S. R. MATTHEWS.

Subscribed and sworn to before me this 16th day of February, 1892.

[NOTARIAL SEAL.]

S. A. —,

— Public for Logan Co., Colo.

Commission expires Aug. 5, 1895.

Defendant rests.

Thereupon, in rebuttal, the plaintiffs introduced the following evidence:

J. K. MULLEN, one of the plaintiffs, being recalled in his own behalf, testified as follows:

Direct examination:

Q. (Showing witness Exhibit 1.) Look at that letter. Is that letter written by you? The date is February 20th, 1892, directed to Judge Symes.

A. Yes, sir.

Q. That is concerning this matter in litigation now?

450 A. Yes, sir.

Q. Have you any explanation to make?

A. Yes, sir. There had been various talks about a compromise with Governor Routt and others, and Governor Routt was in favor of returning back—

Objection by defendant as incompetent, immaterial, and irrelevant.

Q. Had you any talk with Judge Symes? Had there been a talk of compromise between you and Judge Symes?

A. Yes, sir. I had met Judge Symes once about it, I am very sure. I met nearly all the men connected with the company, and likewise, as I remember, among the rest, Judge Symes.

Q. Now you may make your explanation in regard to Exhibit 1.

A. I say, in accordance with the previous understanding and suggestions, I made a sworn statement of the number of our cattle that were found that could be identified and forwarded to the attorney of the Western Union Beef Company, and accompanied it with that document; it speaks for itself.

Q. I understand that is the reason these prices were fixed?

A. They are—

Objection by defendant.

Q. Was that the occasion of the letter?

A. Yes, sir.

Q. As to the affidavits, have you made any examination of them? I think some of the other witnesses testified to that. Do you know anything about that?

A. No, sir.

Q. You had nothing to do with these affidavits?

A. No, sir; I merely forwarded that which was sent to me as the sworn statement.

Plaintiffs rests.

451 Thereupon the defendant moves the court that all the testimony in regard to the dead cattle be stricken out, for the reason that no proof has been offered by the plaintiffs that the same belonged to them, the proof simply showing that said cattle had a brand on them called the box J brand, and the proof fails to show that such brand belonged to these plaintiffs, and said brand has not been proved in the manner required by the statutes of the State of Colorado.

Motion denied.

And the above and foregoing is all the evidence offered, given, or received on the trial of said cause.

Thereupon the plaintiffs request the court to instruct the jury as follows:

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph two of the rules and regulations of the United States Department of Agriculture of April 23, 1891, and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, than that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defendant did not use reasonable care in this case, and that the defendant was guilty of negligence."

Refused by the court, and exception by plaintiffs.

452 Plaintiff requests the court to instruct the jury as to reasonable care, such as a prudent man would exercise about his own matters, but that reasonable care depends on the circumstances of each particular case, depending upon the dangers and loss to result from the want of reasonable care in that particular case.

Refused by the court; to which refusal plaintiffs excepted.

That Secretary Rusk could not do away with or modify paragraph two of the rules and regulations of the department of April 23, 1891, in any such manner as the defendant by its evidence claims that it was so modified or changed, and that said paragraph 2 was in full force and effect at the time of the shipment of defendant's cattle in 1891.

Refused by the court, and exception by plaintiffs.

As to scienter, that it is not necessary; and if it could be found out with reasonable care, then this is scienter, and defendant had knowledge.

Refused by the court, and exception by plaintiffs.

And thereupon the defendant requested the court to instruct the jury as follows:

1. The jury are instructed that under the pleading and evidence in this case the plaintiffs have failed to make out a cause of action against the defendant, and you will return a verdict finding the issues in behalf of the defendant.

Objected to by plaintiffs as incompetent, immaterial, and irrelevant.

453 2. The court instructs the jury that the complaint in this case charges the defendant with having violated a certain act of Congress concerning the shipment of cattle and regulations made in accordance with said act of Congress by the Secretary of Agriculture and the Bureau of Animal Industry, and with having violated the statutes of Colorado concerning the introduction of southern cattle and the regulations made by the sanitary board of Colorado, and negligence is based upon these violations; but you are instructed that the evidence in the case has failed to show that the defendant violated any of these statutes or regulations, State or national, and upon that ground and so far as that element of negligence is concerned you must find the issues joined for the defendant, and if you find for the plaintiffs at all, it must be upon the general allegations of negligence contained in the complaint and as defined and limited by these instructions.

Objected to by the plaintiffs as incompetent and immaterial.

3. The court instructs the jury that for the plaintiffs to recover at all in this case they must allege and prove negligence—that is, some positive act of commission or omission upon the part of the defendant in the shipment of the herd of Texas cattle described in the complaint in evidence, by reason of which injury resulted to the plaintiffs, and negligence is defined to be a failure upon the part of a person to exercise ordinary and reasonable care under all the facts and circumstances of a particular case, and you must find from the evidence that the defendant failed to exercise this ordinary and reasonable care, and that damage resulted to the plaintiff by reason of such want of ordinary and reasonable care.

454 Objected to by plaintiffs as incompetent and immaterial.

4. The burden of proving negligence rests on the party alleging it, who are the plaintiffs in this suit, and where a person charges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of the evidence, and in this case if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiffs cannot recover, and the jury should find the issues joined for the defendant.

Objected to by plaintiffs as incompetent and immaterial.

7. The court instructs the jury that in case they find for the plaintiffs they can only assess damages against the defendant for the reasonable value of the cattle actually lost by them, and they are not to include as an element of damage any loss of sales or profit on sales of cattle made after the fever broke out or any element save and except the actual damage sustained by reason of the death of the cattle.

Objected to by plaintiffs as irrelevant and immaterial.

8. The court instructs the jury that before the plaintiffs can recover for loss on sales of cattle or loss caused by delay in making the sale, which delay arose from any disease breaking out among the plaintiffs' cattle, and such disease was caused by the negligence of the defendant, you must further find from the evidence that the defendant must have known at the time it brought the cattle upon

the range at Iliff that the plaintiff intended to ship *its* cattle, and that this disease would prevent such shipments, and that such disease actually did prevent such shipments.

Objected to by the plaintiffs as incompetent and immaterial.

9. The court instructs the jury that, since the evidence in this case shows all the provisions of the act of Congress to have been complied with and all the rules and regulations made in connection therewith to have been complied with by the defendant in the shipment of its cattle, you are not to take into consideration any violation of the act of Congress or any of the rules and regulations made under and by virtue of such act of Congress.

Objected to by plaintiffs as incompetent and immaterial.

10. The court instructs the jury that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated are not authorized by the Constitution of the United States and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violations of the same would not of itself be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case.

Objected to by plaintiffs as incompetent and immaterial.

11. The court instructs the jury that if you should find the defendant guilty of negligence in this case, it is then your duty to consider whether or not the plaintiffs have been guilty of any contributory negligence, and if you find that the plaintiffs themselves were guilty of negligence which in any manner contributed or aided in producing the acts of which they complain, that then your ver-

dict must be for the defendant, as the rule of law is that where both parties are guilty of negligence neither can recover of the other.

Objected to by plaintiffs as incompetent and immaterial.

12. If the jury believe from the evidence that the plaintiffs had equal means of knowing that the cattle brought in by the defendants were infected with Texas fever or other contagious disease, it was their duty to guard their cattle against it and take such steps that reasonable and prudent men would have taken under like circumstances to prevent their cattle from mingling with those of the defendant, and after the breaking out of the disease, if you find that any disease broke out, to take reasonable steps to prevent its spreading and otherwise protect themselves to their full ability, and if you find that they failed in the exercise of any of these precautions, then the court charges you that they are guilty of contributory negligence and cannot recover in this case.

Objected to by plaintiffs as incompetent and immaterial.

13. The court charges the jury that they must disregard all evidence which has been introduced in the case except that relating to the actual negligence of the defendant, and you cannot find the defendant has been guilty of negligence unless you find that it knew or by the exercise of ordinary and reasonable care ought to have known that the cattle which it transported from Texas to Iliff in the month of June, 1891, were infected with the Texas fever or

some other contagious disease, which would, upon the arrival of said cattle in Colorado, be communicated to cattle with which they were brought in contact, and if you find from the evidence that at the time said cattle were transported it was generally supposed by veterinarians and persons skilled in matters of this kind, familiar with the disease known as Texas fever or whatever contagious disease existed in Kimble county, Texas, that that region of Texas was free from this disease, and that the cattle could be safely transported from that region to Colorado, and that this was the situation of affairs at the time defendant shipped *their* cattle, then you are instructed that the defendant had a right to rely upon this opinion or belief, and its shipment of cattle would not under these circumstances be negligence, and the plaintiff cannot recover.

Objected to by plaintiffs as incompetent and immaterial.

14. The court instructs the jury that both the plaintiffs and the defendant have equal rights upon the public domain of the State of Colorado, and it was not negligence of the defendant to turn its cattle loose upon the public domain unless they had actual knowledge of the fact that they were infected with Texas fever or some other infectious disease or by the exercise of ordinary care and prudence upon their part could have ascertained that fact, and it was not negligence upon the part of the defendant to permit its cattle to mingle with those of the plaintiffs unless you find that the defendant was possessed of such knowledge.

Objected to by plaintiffs as incompetent and immaterial.

15. The court instructs the jury that the plaintiffs allege in their complaint that the cattle of the defendant were liable to be infected with a certain disease known as Texas fever, and rely upon the fact that said cattle were infected with such disease, and that they they must prove their case as alleged, and unless you believe that said cattle were so actually infected with said disease, then the plaintiffs cannot recover. If you find from the evidence that, as a matter of fact, the cattle were not so infected, but simply carried upon them a tick or small animal, which itself caused a disease, then the plaintiffs cannot recover.

Objected to by plaintiffs as incompetent and immaterial.

16. The court instructs the jury that the only charge made in the complaint is a violation on the part of the defendant of certain quarantine regulations established by the authorities of the United States and Colorado, and unless you believe that such quarantine regulations have been actually violated the plaintiffs cannot recover and your verdict must be for the defendant.

Objected to by plaintiffs as incompetent and immaterial.

17. The court instructs the jury that where the words "ordinary care" are used in these instructions they mean such care as a man of ordinary prudence takes in regard to his own business affairs, all the circumstances and surroundings of each case being considered.

Objected to by plaintiffs as incompetent and immaterial.

5. The court instructs the jury that before the plaintiffs can re-

cover in this action they must prove by a preponderance of the evidence each and all of the following facts:

1st. That the cattle brought by the defendants from Kimble county, Texas, to Iliff and unloaded at that point were infected with Texas fever or some other infectious disease.

2nd. That said cattle or some of them, by the negligence of the defendant, were allowed to mingle with the cattle belonging to the plaintiffs.

3rd. And by reason thereof such infectious disease was communicated to the cattle belonging to the plaintiffs.

4th. That by reason of such disease being communicated
459 to the cattle belonging to the plaintiffs some of them died and the plaintiffs sustain loss and damage.

5th. That the defendant knew that such cattle were so infected, or by the exercise of reasonable and ordinary care and prudence upon its part ought to have known that such cattle were so infected.

6th. The court instructs the jury that a rule of law is that every person must be held liable for all of those consequences which flow naturally and directly from his acts or which might have been foreseen and reasonably expected as a result to his conduct, but not for those consequences which do not flow naturally and directly from his acts or which he could not have foreseen and have reasonably anticipated as the result of his conduct; and in this case, if you find that the plaintiffs are entitled to recover something from the defendant, you should confine your verdict only to those elements of damage which flow naturally and directly from the acts of the defendant within the meaning of these instructions.

To each and every part of which instruction plaintiffs objected as incompetent and immaterial.

Thereupon the court instructed the jury (orally) as follows, both sides consenting that the court might instruct orally:

GENTLEMEN OF THE JURY: The plaintiffs allege in their complaint that the year 1891, and prior thereto, they were engaged in the business of raising, herding, grazing, and shipping cattle as copartners, doing business as the Weld County Land and Cattle
460 Company; that they had certain lands which they owned and certain ranches on which their cattle grazed lying along and close to the Platte river, in Logan county, Colorado. They allege that in the month of June, 1891, the defendant, The Western Union Beef Company, negligently, wrongfully, and unlawfully shipped from the county of Kimble, in the State of Texas, a large number of Texas cattle, principally steers; that they arrived in Logan county about the 19th day of June, 1891, and were by the said defendant negligently, wrongfully, and unlawfully unloaded and turned loose at a point or place about three miles west of plaintiffs' land and on the same side of the Platte river as the plaintiffs' said lands and cattle, and of which said cattle of the plaintiffs there was a large number, to wit, about five hundred beef cattle, steers, ready to be shipped to the eastern market, to wit, Chicago and

Omaha, and which said beef cattle were then about to go and would have gone to the said eastern markets long before the first day of December, 1891; that the defendant wrongfully, negligently, and unlawfully unloaded and permitted its said cattle coming from Texas as aforesaid, at the season of the year aforesaid, to occupy said range so occupied by the plaintiffs' cattle, so that its said cattle were by the defendant company allowed and permitted to come in contact with the cattle of the plaintiff, all of which it is alleged was in violation of the quarantine rules and regulations of the United States Department of Agriculture and in violation of the quarantine rules and regulations of the State of Colorado. It is further alleged in the complaint that the defendant well knew the cattle so transported by it from Texas and shipped at the season of the year at

461 which they were so transported were liable to be infected with a contagious disease which was known as the "Texas fever," and that the said disease was more than likely to develop in said cattle on their arrival and being turned loose on the pasture in Colorado, and that said disease would be imparted to their cattle mixing with said Texas cattle or feeding upon the same pasture as the Texas cattle. It is further alleged that the defendant, knowing these facts, negligently permitted its said cattle to run at large upon the range used by the plaintiffs and to mix and intermingle with the cattle of plaintiffs; that shortly thereafter the plaintiffs' cattle became infected with the disease which it is alleged was brought into the country by the cattle of the defendant, and which had been shipped from Texas.

It was the duty of the defendant company not to carelessly or negligently spread a disease among the plaintiffs' cattle; that is a duty which the defendant company owed to the plaintiffs. Before the defendant can be held liable, however, for damages on account of having spread such disease, if you shall find from the evidence that it did by bringing these cattle there spread such disease among the plaintiffs' cattle, you must find from the evidence that under all the circumstances of the case the defendant company failed to exercise that degree of care and caution to prevent the introduction and spreading of such disease which an ordinarily careful and prudent man would or should have exercised under the conditions and circumstances as they then existed. The defendant company is not liable for the introduction and spreading of this disease, if you shall find that it was introduced and spread by it, if it exercised that degree of care and caution in bringing its cattle into that district that an

462 ordinarily careful and prudent man would *would* exercise. Independent of the rules upon the subject, to which I will call your attention a little further along, the defendant had the same right to bring cattle into that country and turn them upon the unoccupied lands belonging to the Government that the plaintiffs had; and if in so doing it had no knowledge that these cattle were likely to spread a disease or by the exercise of ordinary care and prudence would not be led to believe that its cattle were so infected, then it would not be liable for this damage.

In determining the question as to whether the defendant exer-

cised that degree of care and caution to prevent the introduction and spreading of this disease in that neighborhood among plaintiffs' cattle you must take into consideration all the facts and circumstances that have been proven in this case. You must take into consideration the history of this disease, so far as it has been shown by the evidence in this case. You must take into consideration the section of the country from which these cattle were brought and the time of the year at which they were brought into the State of Colorado. You would also take into consideration the general knowledge that existed among men familiar with this class of disease at that time with reference to the nature of this disease and the danger of communicating it from one herd of cattle to another. In other words, you should place yourselves in the shoes of the defendant at that time, and then determine from all the evidence and circumstances proved in the case whether it exercised that degree of care which an ordinarily careful and prudent man would or should have exercised under the conditions and circumstances as they are shown to have then existed. The defendant was only bound to know what was then generally

463 known by men experienced in that business at that time.

It was not bound to anticipate any new discovery or theory of scientific men with regard to this disease. It was bound to know what was generally known and to govern itself accordingly.

In the year 1881 the Congress of the United States enacted a law making it the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, which would cover a disease like this now under consideration, and to certify such rules and regulations to the executive authority of each State and Territory, and to invite said authorities to co-operate in the execution and enforcement of such act.

It seems that prior to April, 1891, the Secretary of Agriculture gave notice, which is equivalent to promulgating a rule or rules under this statute to which I have called your attention, that cattle might thereafter be moved from a certain area (including Kimble county, among others) into the States of Colorado, Wyoming, and Montana for grazing purposes, with this provision, among others, that such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1st, 1891, and that these two classes of cattle—that is, cattle coming from that section from which these came and cattle intended for the eastern markets—should not be allowed to come in contact with each other. It is claimed on the part of the plaintiffs that the defendant violated this provision of this notice. It is claimed on the part of the defendant that prior

to the shipment of the cattle the Secretary of Agriculture
464 had modified this rule. I think the evidence, and I so charge you, fails to show that the Secretary of Agriculture had in a legal manner rescinded or abrogated the rule, so that this rule remained and was in force at the time that these cattle were landed at Hliff, in this State. The rule, then, would have the effect

to give to this defendant notice that the United States authority having in charge the animal industries, so far as the Government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble county at that period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to co-mingle with them.

Taking, then, into consideration all of the evidence and proved circumstances in the case and the natural and reasonable inferences and deductions to be drawn from such circumstances, the questions for you to determine are these: First, did the defendant company introduce and spread any infectious disease among the plaintiffs' cattle, to their loss and damage?

Second. If it did, in so doing, did it fail to exercise that degree of care and caution that an ordinarily prudent and careful man would exercise or should have exercised under the circumstances as they then existed, as shown by the evidence in this case. If the defendant exercised that degree of care and caution in bringing these cattle in and turning them loose upon that range that an ordinarily careful and prudent man under the circumstances would have exercised, then it is not liable in this case, even though damage did result, but if, on the other hand, it failed to exercise that

degree of care and caution, having respect to the rights of
465 these plaintiffs, which an ordinarily careful and prudent man under the circumstances would or should have exercised, and damage has resulted to the plaintiffs therefrom, then they are entitled to recover.

The burden of proof is upon the plaintiffs to show that the defendant company spread the infectious disease among these cattle. The burden of proof is also upon them to show that the defendant failed to exercise that degree of care that I have heretofore instructed you it was its duty to have exercised; in other words, that it omitted to take proper precautions to protect the rights of these plaintiffs. I say the burden of proof is upon the plaintiffs to establish these propositions by a preponderance of the evidence. If the evidence preponderates upon these questions in favor of of the defendant or is equally balanced, then your verdict should be for the defendant; but if it preponderates in favor of the plaintiffs upon these propositions, then your verdict should be in favor of the plaintiffs.

In case you find for the plaintiffs under the evidence and these instructions, they will be entitled to such damages, and such only, as will fully and fairly compensate them for the losses which they have directly and immediately sustained by reason of the alleged wrongful acts of the defendant.

The elements of damage claimed and contended for by plaintiffs come under the following several heads: The claim, first, that this disease was communicated to a certain number of their cattle, which sickened and died in consequence thereof. The burden of proof is upon the plaintiffs to establish by a preponderance of the evidence
the number of their cattle that were so infected—so sickened
466 and died in consequence of the alleged wrongful act of the defendant—and their value. In this connection they are not

limited to the number that their three witnesses, Powell, Matthews, and Greeneman, identified, as they claimed, as being the property of the plaintiffs. It is claimed on the part of the plaintiffs that a large number of cattle died in consequence of this disease, and that some of them were not identified by these three witnesses as belonging to them. Of this matter you are the exclusive judges. The plaintiffs will be entitled to recover, if they are entitled to recover damages at all, for all their cattle that were infected by this disease communicated by defendant's cattle and that died in consequence thereof (not exceeding, however, over one hundred and fifty in number) at the value which the testimony shows they were at that time and place, whether they were counted and registered by these three witnesses or not.

You have heard the evidence and must determine from all the evidence how many cattle they lost by death in consequence of the alleged wrongful acts charged against the defendant, and, whether it be more or less than these three witnesses testified to, the plaintiffs will be entitled to recover therefor at the value that you shall find from the evidence the cattle to be worth at the time of the alleged death. The burden of proof is, of course, upon the plaintiff to establish by a preponderance of the evidence the number of their cattle that were so diseased and did so die in consequence of such disease.

The next element of damage which the plaintiff claims in this action is that *it was* put to extra expense in removing *its* 467 cattle away from the cattle of defendant, which they claim were infected and were liable to further spread the disease. If you shall believe from the evidence that it was necessary for the plaintiffs to so remove their cattle in order to prevent their becoming infected and in good faith they did remove them, they will be entitled to recover such sum as it was reasonable worth to remove them, as shown by the evidence.

The next element of damage which plaintiffs claim is this: That they were prevented from shipping certain of their cattle which were ready for shipment, and which they would have shipped but for the existence of the disease among them, and that during the time they were so prevented the market price or value of the cattle declined. If you shall find from the evidence that ordinary respect for the rights of consumers of beef and ordinary prudence required that they keep their cattle at home and not ship them during the period mentioned, and that in consequence thereof they did retain them and refrain from shipping certain cattle which were ready to be shipped and which they otherwise would have shipped and sold, and there was a decline in the value during that time, they would be entitled to recover this decline in value or this difference in value between the number that they had ready for shipment and would have shipped and the value thereafter at the time when they did ship them, if they shipped them as soon as ordinary prudence under the circumstances permitted them to ship the cattle. The burden of proof, of course, is upon the plaintiff also to establish by the preponderance of evidence this element of damage.

The next element of damage which the plaintiffs claim is that they lost certain calves, occasioned by the death of the
 468 mothers of the calves, caused by the spreading of this infectious disease among them. Plaintiffs claim that these calves died for want of care and nutriment. If you shall believe from the evidence that they did lose any calves from these causes, the plaintiff will be entitled to recover the value of the calves so lost. The burden of proof is upon them to show by a preponderance of the evidence the number of calves so lost, that they were lost in consequence of the death of the mothers, and that the mothers' deaths were caused by the wrongful acts of the defendant as charged, and the value of such calves.

It was the duty of the plaintiffs to exercise that degree of care and caution to protect their own property against this loss that an ordinarily prudent man under the circumstances would exercise—that is, they could not submit their cattle to loss wrongfully or negligently and then charge the loss against the defendants.

To each and every paragraph of which instructions the plaintiffs objected as incompetent and immaterial.

And thereafter, on the 20th day of September following, and while said jury were deliberating upon their verdict, they are brought into court, and thereupon, in the presence of counsel for plaintiffs and defendant, the court further instructs the jury as follows:

“GENTLEMEN OF THE JURY: I am in receipt of a request from you for further instructions in this case, especially in reference to the question as to whether you shall consider a bill of health that is alleged to have been executed for these cattle in the State of
 469 Texas. If you had noticed carefully the instructions already given you would have found that they covered that identical question. I stated to you that you were to consider all the facts and proved circumstances in the case, and from these facts and proved circumstances determine whether or not the defendant company was guilty of the negligence charged against it in the complaint. Of course, you will consider this evidence in connection with the other evidence in the case, and from all the facts and circumstances proved determine the questions that I submitted to you.”

Objected to by plaintiffs and exception.

And thereafter and on the 21st day of September the jury return into court with their verdict, which is as set forth in the transcript of the record herein, at folios —, and which is as follows:

In the District Court.

J. K. MULLEN ET AL., Plaintiffs,

vs.

THE WESTERN UNION BEEF COMPANY, Defendant.

} No. 17054.

We, the jury, find the issue joined for the defendant.

H. R. NELSON, Foreman.

(Endorsed :) Filed in the district court, Arapahoe county, Colorado, September 21st, 1894. Matt. Adams, clerk.

To which verdict and to the receiving and recording of which said verdict the plaintiffs, by their counsel, then and there duly excepted.

And thereafter, on the 22nd day of September, A. D. 1894, the plaintiffs filed their motion for new trial herein, which is as set forth in the transcript of the record herein, at folios —, and is as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } ss :

In the District Court in and for said County.

470 J. K. MULLEN & CHARLES B. MCPHEE, Copartners, etc., }
Plaintiffs, }
vs. }
THE WESTERN UNION BEEF COMPANY, a Corporation, Defendant. }

Motion by Plaintiffs for a New Trial.

And now comes the plaintiffs in the above entitled cause, by Markham & Kingsley, their attorneys, and move the court to set aside the verdict heretofore rendered in this cause and to grant the plaintiffs a new trial therein, and they assign the following causes for this motion:

1. Because the said verdict is contrary to all the evidence in the case.

2. Because the said verdict is contrary to the weight and preponderance of the evidence in the case.

3. Because there was no evidence to support the verdict.

4. Because the verdict is contrary to the law of the case.

5. Because the verdict is contrary to and inconsistent with the instructions of the court and contrary to and inconsistent with the law as contained in said instructions.

6. Because the court erred in refusing to give the instructions asked for by the plaintiffs in it, and by which said instruction, so asked for and refused, the plaintiffs asked the court to instruct the jury that if the defendant violated rule or regulation No. 2 of the rules and regulations of the Agricultural Department of the United States, dated April 23rd, 1891, that such violation of said rule or regulation was, *per se*, negligence on the part of the defendant, and, further, that the court, having refused to give such instruction, did not in its instructions give any instruction or instructions to
471 the jury concerning the point or enlightening the jury upon the matter contained in the said instruction so asked for and refused.

7. Because the instructions of the court do not as a whole properly present the whole of the case to the jury.

8. Because the court erroneously permitted the conversations be-

tween Secretary Rusk, of the Agricultural Department of the United States, and J. L. Brush, the superintendent of the defendant company, — others, as to the oral repeal of rule or regulation No. 2 of the rules and regulations of the Agricultural Department, dated April 23rd, 1891, and the understanding of these parties as to the conversational repeal of the said rule or regulation No. 2 to go to the jury, whereas the recorded evidence and a certified copy of said rules and regulations from the Department of Agriculture showed that said rule and regulation was in full force and effect.

9. That the court erred in permitting the certificate of health issued by the inspector in Texas to be introduced and used as evidence to show that the defendant had not been guilty of negligence by violating rule or regulation No. 2 of the rules and regulations of the Agricultural Department, dated April 23rd, 1891, in the State of Colorado, as this certificate of health could only apply to the condition of the cattle and to the acts of the defendant before and up to the time the cattle left the State of Texas, and could have no bearing upon or be any excuse for the acts of the defendant in violating rule No. 2 of the Agricultural Department by not providing pens for their cattle at Iliff and permitting them to run at large and mingle and come in contact with beef cattle which were ready to be shipped to eastern markets before the 1st of December, 1891.

472-546 10. And for other good and sufficient reasons apparent in the record and from the evidence in the case.

MARKHAM & KINGSLEY,
Attorneys for Plaintiffs.

(Indorsed on the back :) No. 17054. *Mullens et al. vs. Western Union Beef Co.* Copy. Motion for new trial. Original filed 22nd September, 1894. Markham & Kingsley.

* * * * *

And thereafter and on the 17th day of the December, 547-548 1894, the court made the following order in said cause, to wit:

This day, after advisement, the court doth deny plaintiffs' motion for a new trial herein, and let judgment for defendant, on the verdict, be recorded in the judgment book; to which ruling of the court the plaintiffs then and there duly excepted; and the court further order that time and until ninety days from this day be granted the plaintiffs within which to prepare and tender to the judge of this court their bill of exceptions by them reserved herein, which when signed and sealed by said judge shall be filed therein as of this day.

And thereafter, on the same day, the following judgment was entered of record in said cause, to wit:

J. K. MULLEN and CHARLES D. MCPHEE, }
 Doing Business as the Weld County Land }
 and Cattle Company, } 17054. Damages.
vs.
 THE WESTERN UNION BEEF COMPANY. }

17TH SEP., 1894.

The court having this day ordered that judgment be entered herein in accordance with the verdict of the jury: No., therefore, it is considered by the court that the plaintiffs take nothing by their suit, and that said defendant go hence hereof and recover of and from the said plaintiffs its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

To which judgment the plaintiffs duly excepted.

549 And now, forasmuch as the above and foregoing matters and things do not fully appear of record herein, the plaintiffs present this their bill of exceptions and pray the court that the same may be signed, sealed, and made a part of the record herein.

Which is accordingly done this 18th day of April, A. D. 1895, as of the 17th day of December, 1894.

DAVID V. BURNS, *Judge.* [SEAL.]

Tendered to me for signing and sealing this 12th day of March, 1895.

D. V. BURNS, [SEAL.]
Judge who Tried the Case.

Tendered to me this — day of January, A. D. 1895.
 — — —, *Judge.*

Tendered to me for signing and sealing this 12th day of March, 1895.

FRANK T. JOHNSON,
*Judge Presiding in the Division of
 Court in which said Case was Tried.*

550 In the Supreme Court of the United States, October Term, 1897.

J. K. MULLEN and CHARLES D. MCPHEE, }
 Plaintiffs in Error, }
versus } No. 441. Stipulation.
 THE WESTERN UNION BEEF COMPANY, De- }
 fendant in Error. }

It is hereby stipulated between the parties to this suit that the following portions of the record thereof need not be printed by the clerk of said court, to wit:

First. The testimony of the following witnesses: Charles G. Lamb, Willis E. Greenman, I. N. Ford, Samuel Rice, E. Hageman, J. H. Perkins, Walter G. Brush, and H. H. Metcalf.

Second. The further or additional motion for a new trial filed in

the trial court October 8th, 1894, and all the affidavits in support of and against said additional motion.

It is further agreed that this stipulation shall be substituted for and take the place of the stipulation already on file with the clerk of the said Supreme Court having reference to the printing of the said record.

22d April, 1898.

W. C. KINGSLEY,
Attorneys for Plaintiffs in Error.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

551 [Endorsed:] No. 441. Oct. term, 1897. In the Supreme Court of the United States. J. K. Mullen & Chas. D. McPhee, plaintiffs in error, *versus* The Western Union Beef Co., defendants in error. Stipulation. William C. Kingsley, att'ys for pl'ffs in error.

552 [Endorsed:] Case No. 16,654. Supreme Court U. S., October term, 1898. Term No., 153. J. K. Mullen *et al.*, pl'ffs in err., *vs.* The Western Union Beef Co. Stipulation to omit certain parts of record in printing. Filed May 9, 1898.

Endorsed on cover: Case No. 16,654. Colorado court of appeals. Term No., 153. J. K. Mullen and Charles D. McPhee, plaintiffs in error, *vs.* The Western Union Beef Company. Filed August 20, 1897.

FILED

OCT 28 1898

JAMES H. McKENNEY,
Clerk

No. 153.

By. of Kingsley for

Filed Oct. 28, 1898. 898

THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1898, No. 153.

JOHN K. MULLEN AND
CHARLES D. MCPHEE,

Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF
COMPANY,

Defendant in Error.

*Error to the Court
of Appeals of the
State of Colorado.*

STATEMENT AND BRIEF OF PLAINTIFFS IN
ERROR.

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.



IN
THE SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1898, No. 153.

JOHN K. MULLEN AND
CHARLES D. MCPHEE,

Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF
COMPANY,

Defendant in Error.

*Error to the Court
of Appeals of the
State of Colorado.*

STATEMENT AND BRIEF OF PLAINTIFFS IN
ERROR.

STATEMENT OF CASE.

The action was brought by the plaintiffs in error to recover damages for loss of cattle on their range in Colorado in the summer of 1891, occasioned by the introduction among their cattle of a large herd of 3,000 head of Texas cattle in June of that year, in violation of the Act of Congress of May 29, 1884, and the rules and regulations made

thereunder in February and April, 1891, by the Secretary of Agriculture. The defendant denied such violation and damage.

These rules and regulations were introduced in evidence by said plaintiffs upon the trial of the case and their violation shown, resulting in large loss to the plaintiffs; but they were deprived by the trial court and also by the Court of Appeals, of the benefit of said act and the rules made thereunder; the trial court only giving to the rules the effect of notice or opinion, while the Court of Appeals held them inoperative, because unauthorized by said Act of Congress.

There are nine errors assigned in this Court, all of which we shall present and discuss under the second and third propositions now to be stated, as follows:

We contend:

First—That the judgment we ask to have reversed was rendered by the highest court in the state of Colorado, in which a decision in the suit could have been had.

Second—That in the Court pronouncing such judgment, the decision of a federal question was necessary to the determination of the case, and such question was actually decided adverse to the plaintiffs in error; and

Third—That such decision was erroneous.

FIRST.

The Court of Appeals of Colorado was the highest court in the state in which a decision in this suit could have been had.

This Court of Appeals was created by an Act

of the Legislature of said state, approved April 6, 1891.

Session Laws of Colorado for 1891, p. 118.

Section 1 of said act provides as follows:

"No writ of error from, or appeal to, the Supreme Court shall lie to review the final judgment of any inferior court unless the judgment, or in replevin the value found, exceeds \$2,500, exclusive of costs. Provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the state or of the United States is necessary to the determination of a case. Provided, further, that the foregoing limitation shall not apply to writs of error to county courts."

Section 4 of said act provides:

"That the said court shall have jurisdiction:

"*First*—To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"*Second*—It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or in replevin the value found is \$2,500 or less, exclusive of costs.

"*Third*—It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the state or of the United States is necessary to the decision of the case, also in criminal cases or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the Court of Appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the Supreme Court."

Unless the adjudication of this case involved a franchise or freehold, or the construction of a pro-

vision of the Constitution of the state of Colorado or of the United States, the judgment of the Court of Appeals is final, and therefore confers upon *this* Court jurisdiction.

It is certain that no franchise or freehold or construction of any provision of the constitution of the State of Colorado was involved, so that the only remaining question is whether the construction of any provision of the constitution of the United States was "necessary to the decision of the case" as required by said section 4, which could, if true, deprive this judgment of its final character.

Walter A. Wood Mowing and Reaping
Machine Co, vs. Skinner, 139 U. S., 293.

As above stated, this case was brought to recover damages sustained by the plaintiffs below on account of the introduction by the defendant below, of a herd of Texas cattle in June, 1891, into the plaintiffs' herd of domestic cattle in Colorado. The cause of action alleged in the complaint was the violation by said defendant of certain rules and regulations made by the United States Department of Agriculture in February and April, 1891, in accordance with and by virtue of an Act of Congress, approved May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry, etc." 23 U. S. Statutes at Large, p. 31. The defendant denied the violation of said rules and regulations, and attempted, without success, to show their subsequent modification through oral interviews, and the trial court was asked by the plaintiffs to instruct the jury as follows, as to the force and effect of such rules and regulations :

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph 2 of the rules and regulations of the United States Department of Agriculture of April 23, 1891 ; and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, then that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defendant did not use reasonable care in this case, and that the defendant was guilty of negligence."

Refused by the Court and exception by the plaintiffs.

And also, "that Secretary Rusk could not do away with or modify paragraph 2 of the rules and regulations of the department of April 23, 1891, in any such manner as the defendant, by its evidence, claims that it was so modified or changed ; and that said paragraph 2 was in full force and effect at the time of the shipment of defendant's cattle in 1891."

Refused by the Court and exception by plaintiffs. Page 251, printed record.

These instructions were refused, but the trial court among other things, upon its own motion, instructed the jury as follows :

"In the year 1884 the Congress of the United States enacted a law making it the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, which would cover a disease like this now under consideration, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of such act.

"It seems that prior to April, 1891, the Secretary of Agriculture gave notice, which is equivalent to promulgating a rule or rules under this statute to which I have called your attention, that cattle might thereafter be moved from a certain area (including Kimble county, among others) into the states of Colorado, Wyoming and Montana for grazing purposes, with this provision, among others, that such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes of cattle—that is, cattle coming from that section from which these came, and cattle intended for the eastern markets—should not be allowed to come into contact with each other. It is claimed on the part of the plaintiffs that the defendant violated this provision of this notice. It is claimed on the part of the defendant that prior to the shipment of the cattle the Secretary of Agriculture had modified this rule. I think the evidence, and I so charge you, fails to show that the Secretary of Agriculture had in a legal manner rescinded or abrogated the rule, so that this rule, remained and was in force at the time that these cattle were landed at Iliff, in this state. The rule, then, would have the effect to give this defendant notice that the United States authority having in charge the animal industries, so far as the government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble county at that period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to commingle with them." (Pp. 257-8, printed record.)

The trial court, it will be seen, construed these rules and regulations made by a cabinet officer under the authority of an Act of Congress, as effective only as *notice* or matter of *opinion*; while the Court of Appeals, in deciding the case, in construing this Act of Congress, which author-

size said rules, held that these rules and regulations were not in force because they were not made in conformity with, nor authorized by said act. Neither the trial court nor the Court of Appeals construed, or had occasion to construe any provision of the constitution of the United States, so that it is true that the judgment of the Court of Appeals in this case was a final judgment of the highest court of the state of Colorado in which a decision of the case could have been made; for unless, as above shown, it was necessary to the decision of the case that the Court of Appeals should construe some provision of the constitution of the United States, no appeal from, or writ of error to, that court would lie to have its judgment reviewed by the Supreme Court of the state of Colorado, and inasmuch as the case was heard and decided by the trial court and the Court of Appeals without any reference by either court to or any construction of any provision of the constitution of the United States, how can it be said that such construction was "necessary to a decision of the case?"

Dean vs. Nelson, 7 Wall., 342.

McGourkey vs. R. R. Co., 146 U. S., 536.

Dainess vs. Kendall, 119 U. S., 53.

SECOND.

The Court which rendered this judgment, decided a Federal question adversely to the plaintiffs in error, and such decision was necessary to the determination of the case.

To make this clear let us look again at the case in the trial court.

The complaint alleges, among other things (page 23 of printed record), that plaintiffs were engaged in the cattle business in the state of Colorado; that the range for their cattle was mainly, if not entirely; in the county of Logan, in said state; that said range lies along and near the Platte river, upon the lands of the plaintiffs and the public lands adjacent thereto, and that in and during the year 1891 the plaintiffs had upon said range about 3,000 head of cattle.

That about the fifteenth of June, 1891, the defendant negligently, wrongfully and unlawfully shipped from Kimble county, Texas, and other parts of said state, a large number of Texas cattle, principally steers, which were about the nineteenth day of said month negligently, wrongfully and unlawfully loaded and turned loose at a point about three miles west of plaintiffs' said lands and cattle; that among the said plaintiffs' cattle there were about 500 beef cattle—steers—ready to be shipped to Omaha and Chicago—Eastern market—and that said beef cattle were then about to go, and would have gone, to said Eastern markets long before the first of December of that year, and that the defendant wrongfully, negligently and unlawfully, allowed and permitted its said Texas cattle at the said season of the year to occupy the range which the plaintiffs' cattle occupied, and that the said defendant allowed and permitted its said cattle to come in contact with the said cattle of the plaintiff contrary to and in violation of the quarantine rules and regulations and orders of the United States Department of Agriculture, established under and by virtue of the acts of Congress, and also contrary

to and in violation of the quarantine rules, regulations and orders of the state of Colorado, issued and established for the year 1891.

Then follow allegations as to the spread of the contagion from the cattle of defendants to those of the plaintiffs, and the consequent loss to plaintiffs.

The answer of defendant denies negligence on his part, and denies that it transported cattle from Texas to Colorado contrary to, or in violation of, any regulations of the United States Department of Agriculture, but alleges that all cattle transported by it were transported in strict accordance with such regulations.

Here was a clear tender and joinder of issue upon the question of the negligence of defendant company, through violation of the regulations of the United States Department of Agriculture made and existing by authority of the Act of Congress.

In the submission of the case to the jury the trial court presented the contention of plaintiffs that their loss was occasioned through the violation by defendant of the Act of Congress, and the regulations made thereunder by the Secretary of Agriculture concerning the introduction of cattle, as above shown in this brief.

Plaintiffs claimed their right to recover for loss sustained by them through a violation by defendant of the Federal regulation mentioned, under the well known principle of law, that where loss is occasioned by the violation of a public law or regulation, the violator is by that act guilty of negligence as matter of law, and no proof of negligence in *fact* is required to fix upon him the liability to respond in damages for the loss occasioned by such unlawful

act. In other words, in such case, to entitle plaintiffs, *prima facie*, to recover, they had only to prove the violation by defendant of the rules and regulations and the loss ensuing to them in consequence of such violation.

The instructions given by the Court show that a construction of this Act of Congress and these rules and regulations was given by the trial court, and that such construction deprived plaintiffs in error of a right claimed under said Act of Congress and rules and regulations, and of which construction plaintiffs in error complain. The trial court, as above shown, gave to such rules and regulations the force and effect only of *notice* or the expression of an *opinion* by the Department of Agriculture, while plaintiffs in error then contended and now contend that they had the force and effect of law.

Wilcox vs. Jackson, 13 Peters, 498.

Adams vs. Freeman, 50 Pac. Rep., 135.

If we look now at the decision of the Court of Appeals, we find that this Court rested its decision entirely upon a Federal question.

A reference to the opinion (pages 7 and 8 of printed record) shows that the Court of Appeals affirmed the judgment of the court below solely on the ground that it was the evident intention of Congress that the rules and regulations to be made under the act by the Commissioner of Agriculture or the Secretary of Agriculture were not to have force until accepted by the local executive authorities; that the regulations of February 5th and April 23d of the said secretary were not within, but were beyond, the provisions of the said Act of Congress.

There were some errors claimed as to the admission and exclusion of evidence, and as to the instructions of the court below, but the Court of Appeals, after delivering its opinion as to the three foregoing points disposes of the questions as to evidence and instructions in the following language:

" * * * It would have been of no benefit to the plaintiffs if everything in the way of evidence which they offered had been received and everything that they objected to had been excluded; so that the errors, if any, were harmless."

Nothing more conclusive could be sought for as to the fact that the judgment was solely upon the construction of a Federal question, and that it deprived plaintiffs in error of rights claimed thereunder.

Walter A. Wood Mowing and Reaping
Machine Co. vs. Skinner, 139 U. S.,
supra.

THIRD.

The decision of the Federal question by the Court of Appeals was erroneous.

The Federal question referred to in this proposition is the construction given by the Court of Appeals:

- 1st. To the said Act of Congress of May 29, 1884; and
- 2d. To the rules and regulations of February 5th and April 23d, 1891.

The purpose of this act was to establish a Bureau of Animal Industry, and through it to provide means for the suppression and extirpation of diseased cattle, and prevent their exportation abroad or commercial *status* at home.

By Section 2 of the Act, the Commissioner of Agriculture was empowered to appoint agents, whose duty it should be, under his instructions, to examine and report upon the means to be adopted for the suppression and extirpation of pleuro-pneumonia, and to provide against the spread among animals of other dangerous, contagious and infectious diseases. Section 3 made it his duty to prepare such rules and regulations as he might deem proper for the speedy and effectual suppression and extirpation of the diseases referred to, and to certify such rules and regulations to the executive authority of each state and territory, and invite such authority to co-operate in the execution and enforcement of the act, authorizing him, upon the acceptance by any state or territory wherein such disease should be declared to exist, of his plans and methods, or, upon the acceptance by him of plans or methods adopted for the same purpose by any such state or territory wherein such disease should be declared to exist, to expend so much of the money appropriated by the act as might be necessary to prevent the spread of such diseases from one state or territory into another. Section 4 required him to make special investigation as to the existence of any of the diseases along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock were exported, and report the result of his investigation to the Secretary of the Treasury, who should, from time to time, establish such regulations for the export and transportation of live stock as the result of the investigation might require. Section 5 author-

ized the Secretary of the Treasury, for the purpose of preventing exportation from the United States to foreign countries, of live stock affected with contagious diseases, to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. Sections 6 and 7 are as follows:

"Section 6. That no railroad company within the United States, or the owners or masters of any steam, or sailing, or other vessel, or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of Sections 4, 5, 6 and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"Section 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company, doing business in or through any infected locality, and by publication in such newspapers as he may select,

of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of, or person having control over, such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

By subsequent legislation the Department of Agriculture was created, to be under the supervision and control of a Secretary of Agriculture, and the authority vested in the Commissioner of Agriculture, and the duties which the law devolved upon him, were transferred to the Secretary of Agriculture. Whatever orders, therefore, the commissioner could have lawfully issued could be issued by the secretary as his successor.

The rules and regulations introduced in evidence by the plaintiffs were dated, respectively, February 5 and April 23, 1891, and are as follows:

"Regulations Concerning Cattle Transportation.—United States Department of Agriculture. Office of the Secretary, Washington, D. C., February 5, 1891. To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen and Others: In accordance with Section 7 of the Act of Congress, approved May 29, 1884, entitled 'An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and of the Act of Congress, approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year

ending June 30, 1891, you are notified that a contagious and infectious disease known as splenetic or southern fever exists among cattle in the following described area of the United States. (Here follows a certain described area.)

From the fifteenth day of February to the first day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations." (Here follows a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts. See printed record, pages 51 and 52.)

"United States Department of Agriculture. Office of the Secretary, Washington, D. C., April 23, 1891.—Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described may be moved from said area by rail into the states of Colorado, Wyoming and Montana, for grazing purposes, in accordance with the regulations made by said states for the admission of southern cattle thereto. Provided:

(1) That cattle from said area shall go into said states only for slaughter or grazing, and shall on no account be shipped from said states into any other state or territory of the United States before the first day of December, 1891.

(2) That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

(3) That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5, 1891.

(4) That the state authorities of the states of Colorado, Wyoming and Montana agree to enforce these provisions."

The territory described in both orders includes that from which the defendant's cattle were shipped, and it is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which are claimed to have been violated by the defendant.

The rules and regulations made by the direction of a statute have the authority of the statute itself, and ~~that~~ their violation is, in effect, a violation of the statute.

The Court of Appeals held that these rules and regulations were inoperative because

First—Not made under Section 3 of said act ^{but under}

Second—Not accepted by the executive authority of Colorado.

Third—They violated Section 6 of said act.

^{re-}
~~legis-~~ In reply to these objections, we say as to this legislation of February 5 :

First—It refers not only to Section 7 of the act of May 29, 1884, but to the Act of July 14, 1890.

Second—It purported to give the *notice* required by Section 7, and then proceeds to exercise the *power* authorized by Sections 3 and 7.

Third—The recital or mention by the secretary of the wrong section of a statute for the source of his power, would not and did not limit any power conferred on him by congress through this act.

Fourth—This rule was no violation of Section 6 of said act.

This Section 6 prohibited—

First—Any transportation company *anywhere in the United States* from receiving for transporta-

tion or transporting from one state to another any *diseased* cattle.

Second—Any delivery for such transportation *with knowledge* of such disease.

Third—Transportation on foot or private conveyance of any *diseased* cattle, knowing them to be diseased.

As to this Section 6, we note that its prohibitory features are aimed at *diseased cattle*, and not at any *locality*. Its provisions did not apply to "cattle being transported by *rail to market for slaughter*, when the same are unloaded only to be fed and watered in lots on the way thereto."

Congress did not designate the infected localities or districts, this is necessarily left for the administrative department of the government, and this power to so designate is by necessary implication found in both Sections 3 and 7.

The rules *expressly* authorized in Section 3 are "for the speedy and effectual suppression and extirpation" of this disease among cattle. The power of designating certain states or territories or geographical localities as an "infected locality" or an "infected district," within the meaning of Section 7, is not *expressly* conferred either by Sections 3 or 7, but that it is given by necessary implication in both sections must be conceded, so that our Court of Appeals erred in depriving these rules of February 5th of force, because not authorized by Section 7, under which they were claimed to have been made.

Again, this rule did not in fact nor did it in effect, permit anything prohibited by said Section 6, for, as we have already said, said section had no

reference to *locality*, but to *cattle* anywhere in the United States. It will be noted that the secretary by this February 5th rule did not authorize the removal of *diseased* cattle, contrary to said Section 6, but did, under certain conditions, permit the moving only of cattle which it was thought *safe to move*.

The secretary had the power to designate the "infected districts," but the exercise of such power necessarily involved the discriminative removal of cattle from such district.

To illustrate: On the first day of February, 1891, there were diseased cattle in certain portions of the United States, but no locality or district had been designated as "infected," yet Section 6 was operative prohibiting the transportation of "*diseased* cattle" from *any part* of the United States to *any other* part; and the secretary of agriculture was as amenable to this prohibition as any other person.

Five days later the secretary designates a certain area of the country as that within which "a contagious and infectious disease known as splenic or southern fever exists among cattle"—not *all* cattle—and then proceeds to regulate the removal of cattle (not diseased cattle) from such locality under such rules as he "deemed necessary" as authorized by the act.

A reference to this rule will show that this infected district embraced nearly all of the state of Texas and nearly all of the United States south of the old "Mason and Dixon" line, east to the Atlantic Ocean. Shall we say that by this rule of February 5 all cattle in this half of the country were

made *diseased* cattle within the meaning of said Section 6, and that any regulation by the secretary for removing any of them, though not intended for slaughter, would be in violation of said section and so inoperative? To ask this question is but to answer it, and yet such was the decision of our Court of Appeals of which we complain.

Again; the Court of Appeals held this rule inoperative because it was not shown to have been accepted by the state of Colorado, and this because Section 3 made the expenditure of money appropriated by *that act* dependent upon such acceptance.

The proposition of our Court of Appeals can be formulated thus:

1st. The law confers upon the secretary the power and makes it his duty to make "such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation" of this disease among cattle.

2d. The law also appropriates \$150,000 to carry its provisions into effect, but does not authorize the expenditure of any part of such appropriation in the state of Colorado until this state shall signify its acceptance of the said rules and regulations.

3d. *Ergo*, these rules and regulations are inoperative in Colorado.

The fallacy of this construction of Section 3 of this act given by our Court of Appeals becomes undeniable when put thus in syllogistic form.

But again, this limitation as to expenditure was inoperative in 1891, when these rules were made, because this limitation was confined to the "money appropriated by *this act*" in the year 1884.

This act was passed in 1884, and nearly *seven*

years thereafter an "infected district" was designated by the rules made under it. In the meantime, Congress, at every session, renewed its appropriations to make this act effective, as follows: June 30, 1886, \$100,000; March 3, 1887, \$500,000; July 18, 1888, \$500,000; March 2, 1889, \$500,000; July 14, 1890, \$350,000; and the unexpended balance of the fiscal year 1890. These appropriations will be found in the following volumes of the U. S. Statutes at Large, viz.: 24, pages 103, 499; 25, pp. 333, 839; 26, p. 287.

After this last named appropriation of \$350,000, in July, 1890, and in the beginning of the next year, the Secretary of Agriculture made rules and regulations under this act, and Congress, in making this liberal appropriation of \$350,000, placed no restrictions upon its expenditure in states failing to accept the rules and regulations of the secretary.

So far we have addressed our remarks to the rules of February 5, 1891; but what we have urged will apply with equal force to the rules of April 23, 1891, but as to which, however, we say in addition:

First—These last rules do not purport to be made under any particular section of said act, nor do they purport to be a modification of the rules of February 5th.

Second—That portion of the rules which provides that cattle permitted into Colorado should not be allowed to come in contact with "cattle going to the Eastern markets," is authorized by said Act as a regulation of interstate commerce, and is not the exercise of a police power within the states.

As was said by this Court in the case of

Leisy vs. Hardin, 135 U. S. 100: "To extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within the police power any article of consumption that a state might wish to exclude. * * * The power to regulate commerce * * * among the several states cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces. * * * "

Third.—Should it be said that the rules of April 23 were inoperative because it was not shown "that the state authorities of the states of Colorado, Wyoming and Montana agreed to enforce" them as provided in the fourth paragraph of said rules, we reply that in such case the rules of February 5 would be operative, as to the violation of which by the defendant company there was no question, but which rule the Court of Appeals held also inoperative, as above shown, thereby depriving plaintiffs in error of the rights claimed thereunder.

We ask for such a construction of this statute as will effect the object for which it was passed.

In the case of *Lan O. W. Beer vs. United States*, 144 U. S., 47, this Court said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and if possible, avoid an unjust or absurd conclusion."

The construction given by our Court of Appeals to this act by which its effectiveness was made largely dependent upon the assent of the local authorities was a pronounced subordination of con-

gress with reference to this vital branch of interstate commerce, to the supremacy of the several states and territories, in the absence of any provision in the statute recognizing or suggesting such subordination, so that this important legislation instead of being the "supreme law of the land," dropped to the level of what we generally designate as a "local option law."

In the case of *The Wheeling and Belmont Bridge Company vs. The Wheeling Bridge Company*, 138 U. S., 287, this Court used the following language pertinent to the present case :

"The alleged suspension of the power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers or special tribunals, or from any doubtful or uncertain expressions."

By the construction given by our Court of Appeals to this Act, the power therein conferred upon the Secretary of Agriculture to make proper rules by and through which its most important and beneficent purposes might be effected, was swept out of existence by construing an *implied* limitation as to the *expenditure of money*, as a limitation upon the *power* conferred to enforce the law itself, in direct opposition to the doctrine of this Court which we have last quoted.

By this clearly erroneous construction, these plaintiffs in error were told to pocket their loss of thousands of dollars and together with the multitude of owners of smaller herds in the same general locality whose losses were proportionately as large, were compelled to pay tribute to the rapacity and

criminal negligence of this defendant company.

We see no escape from a reversal by this Court of the judgment of which we complain.

Respectfully submitted.

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.

No. 153.

FILED
OCT 28 1898

JAMES H. MCKENNEY,
Clerk.

Reply Br. of Kingsley for P.

IN
Filed Oct. 28, 1898.
THE SUPREME COURT

OF THE
UNITED STATES.

J. K. MULLEN AND CHARLES
D. MCPHEE,

Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF
COMPANY,

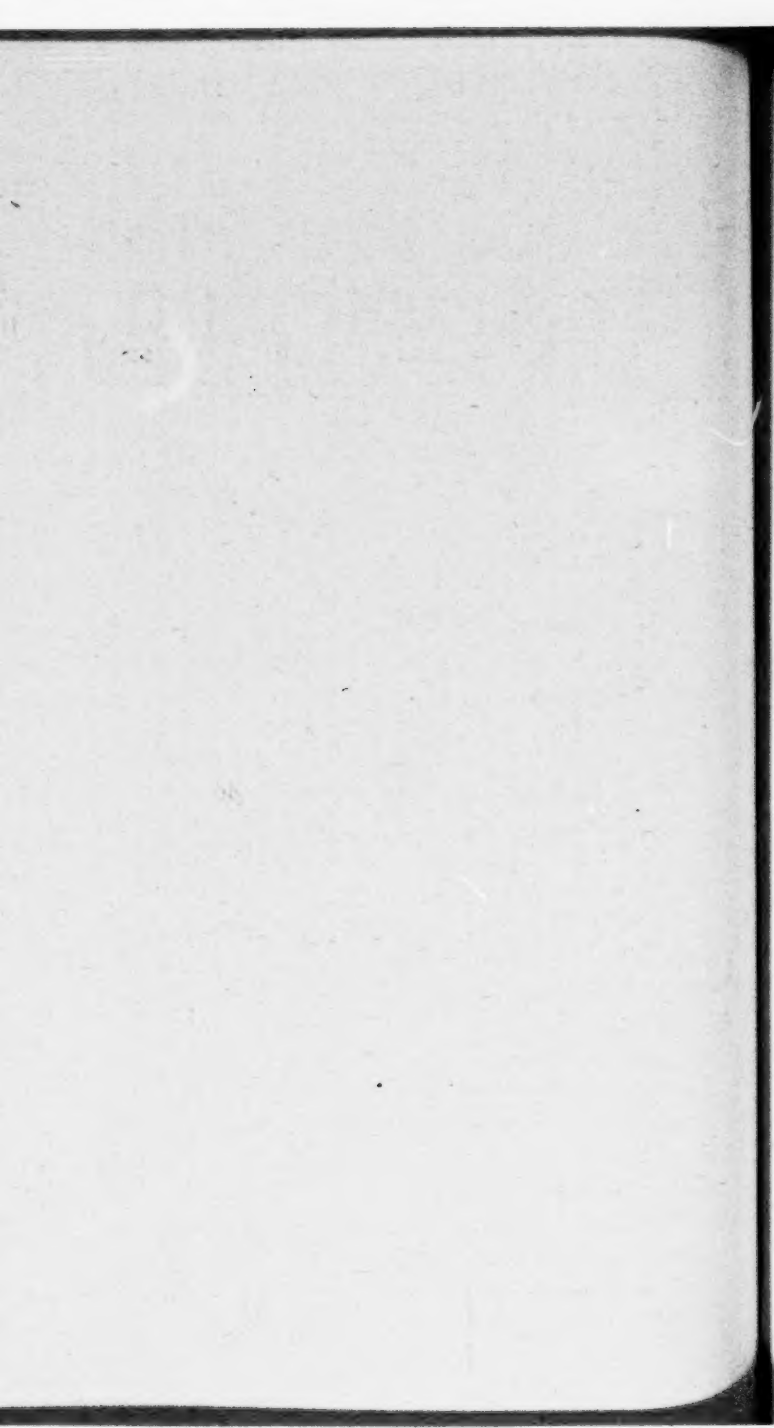
Defendant in Error.

*October Term, 1898
No. 153.*

REPLY BRIEF OF PLAINTIFFS IN ERROR.

W. C. KINGSLEY,

Attorney for Plaintiffs in Error.



IN
THE SUPREME COURT
OF THE
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J. K. MULLEN AND CHARLES
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Plaintiffs in Error,

vs.

THE WESTERN UNION BEEF
COMPANY,

Defendant in Error.

*October Term, 1898
No. 153.*

REPLY BRIEF OF PLAINTIFFS IN ERROR.

In our opening brief we contended :

First—That the judgment we ask to have reversed was rendered by the highest court in the State of Colorado in which a decision in this suit could have been had.

Second—That when the Court pronounced such judgment a decision of a Federal question was necessary to the determination of the case, and that such question was actually decided adversely to the plaintiffs in error.

Third—That such decision was erroneous.

We have been furnished with a copy of a motion to dismiss and the brief of the defendant in

error. The motion to dismiss is based upon two grounds, hereinafter stated.

Having anticipated this motion, we have answered it fully in our opening brief, but deem it proper now to answer the views urged by the defendant in its brief in support of the motion.

The grounds urged in support of this motion to dismiss are as follows:

"First—This Court has no jurisdiction to pass upon the questions raised in said cause, for the reason that the said cause was not heard and determined by the highest court of the state of Colorado having jurisdiction thereof, the said cause having been commenced in the District Court of Arapahoe county, Colorado, and determined in favor of the defendant, The Western Union Beef Company, and thereupon said cause was taken by writ of error to the Court of Appeals of the state of Colorado, where the judgment of the District Court of Arapahoe county was confirmed; thereupon the plaintiffs in error sued out a writ of error to this Court, when, under the constitution and laws of the state of Colorado, the Supreme Court of said state had full and complete jurisdiction thereof, and a writ of error could have been sued out to the Supreme Court of the state of Colorado, and until such writ of error was sued out this Court had no jurisdiction to hear and determine the same; all of which facts appear upon the record in this case.

"Second—This Court has no jurisdiction to pass upon said writ of error, for the reason that all of the Federal questions raised in said cause in said courts of Colorado were decided in favor of the plaintiffs in error, the said Federal questions con-

sisting of certain rights claimed by J. K. Mullen and C. D. McPhee, the plaintiffs in error, under certain acts of Congress creating the Bureau of Animal Industry and rules and regulations made by the Department of Agriculture, and all of the rights and immunities claimed under and by virtue of said statutes were decided in favor of the said J. K. Mullen and C. D. McPhee, as will more fully appear by the record in said cause."

It seems difficult, without mere repetition of what is stated in our opening brief, to show the clear fallacy of this contention on the part of the defendant in error. Certainly it is too clear to require argument that the judgment in this case was pronounced by the highest court of the state having jurisdiction, unless, in the language of the statute creating the court, "the construction of a provision of the Constitution of the United States was necessary to a decision of the case." True it is that the trial court, as well as the Court of Appeals, reached a decision in this case without "a construction of a provision of the Constitution of the United States," and, in fact, without any reference whatever to this Constitution. It is beyond our comprehension how it can be urged that such construction of the Constitution was *necessary* when, as a matter of fact, both courts expressly ignored such construction. This I find to be one of the contentions in the very able brief of the opposing counsel, which it is difficult to consider at length because the contrary of such contention seems to us so self-evident.

Opposing counsel say that "the construction of a provision of the Constitution of the United

States was necessary to the decision of the case." Both of the judicial tribunals which have been called upon to decide the controversy have absolutely refused to furnish any construction whatever of this Constitution, but have reached their conclusions by another and entirely different route.

The fallacy of this contention on the part of the defendant in error is conclusively shown by the decision of this Court in the case of *Bacon vs. The State of Texas*, 163 U. S., 207, cited on another point, however, by the defendant in error in its brief. The answer of the defendants in that case based their defense expressly upon the point that the statute of Texas, under which the state claimed was, under the Constitution of the United States (Article II, Section 10, Subdivision one), void because affecting vested rights. But the trial court, as well as the appellate court, determined the controversy without considering this constitutional question, and so this Court held that no Federal question was involved in the case, thereby establishing the doctrine for which we contend, that it was for the court that decided this case and not for the counsel for the defendant in error to determine the question whether "the construction of a provision of the Constitution of the United States was necessary." And, having decided this question in the negative, the judgment of the Court of Appeals in this case was final under the statute creating such court.

Suppose the plaintiffs, in error *had* taken this case from the Court of Appeals to the Supreme Court of this state and the defendant in error had there moved to dismiss for want of juris-

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A late case of this Court decisive of this
question is *Muse vs Arlington Hotel Co.*,
168 U S 430.

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diction upon the ground that "the construction of a provision of the Constitution of the United States was *not* necessary to a decision of the case;" what reply could the plaintiffs in error have made to such motion? How could they then say that such construction *was* necessary, when the record distinctly showed the contrary? And how, therefore, could the jurisdiction of our Supreme Court have been sustained? The plaintiffs in error were not required to do a useless thing by taking an appeal to the Supreme Court of the state when such court could have no jurisdiction, and the cases cited in the brief of the other side sustain no such contention.

The cases of *Fisher vs. Perkins*, 122 U. S., 522, and *Bacon vs. The State of Texas*, 163 U. S., 207, cited by opposing counsel, are based upon state legislation which vested a *discretion* in the Supreme Court of the state to entertain jurisdiction, and which court, therefore, had to be first resorted to and jurisdiction declined before a writ of error from this court would lie to the lower court which rendered the judgment; whereas, in this state, no such discretion exists in the Supreme Court of the state of Colorado, as will be seen upon examination of the statute which is quoted in our opening brief. And, therefore, no attempt was necessary to take this case to the Supreme Court of the state and there have it dismissed for want of jurisdiction.

The cases of *McComb vs. Knox County*, 91 U. S., *The Great Western Telegraph Co. vs. Burnham*, 162 U. S.; and *Levy vs. Superior Court*, 167 U. S., cited in the brief of opposing counsel, are not in point upon this question.

Second; opposing counsel say that whatever Federal question there may have been in this case has been decided in favor of the plaintiffs in error. This contention, like the preceding one, has been fully answered in our opening brief; but it is now said by the other side that the plaintiffs in the trial court, and plaintiffs in error here, failed to properly except to the charge of the Judge, and, therefore, cannot now complain of the instructions given by the Court as to the rules and regulations which we allege were violated.

To this we answer:

First, that at the close of the trial the plaintiffs presented to the Court four instructions, with a request that they be given to the jury, every one of which was refused by the Court, and an exception to such refusal duly taken. (Printed record, 251.)

Second, the refusal of the first and fourth of these instructions was manifest error, and the second and third were, in substance, covered by the charge of the Court.

The rules and regulations made under the Act of Congress by the Agricultural Department have the same force and effect as though made by the president.

Woolsey vs. Chapman, 101 U. S., 755.

Wilcox vs. McConnell, 13 Pet., 498.

Such rules and regulations have the force and effect of law, and their violation is *prima facie* negligence, or negligence *per se*.

Beisel vs. New York Central Co., 14 Abb. Pr. Reports, N. S., 35.

II. Thompson on Trials, Sec. 1719.

Chicago R. R. Co. vs. Elmer, 67 Ill., 177.
Karle vs. Kansas R. R. Co., 55 Mo., 476.
Sherman & Redfield on Negligence, 3d
Ed., p. 16, Sec. 13a.
Moody vs. Osgood, 60 Barb., 644.
I. Thompson on Negligence, 506, Sec. 8.
Seimers vs. Eison, 54 Calif., 418.
Central R. R. Co. vs. Smith, 78 Ga., 694.
Peper vs. Chicago, 46 N. W. Reporter
(Wis.), 165.

And while the latest decisions in New York may not fully sustain this proposition, this is the law of most of the states and also of Colorado.

Denver Railroad vs. Ryan, 17 Colo., 101.
Ditch vs. Zimmerman, 4 Colo. App., 78.
Pueblo vs. Smith, 3 Colo. App., 386.
Denver R. R. Co. vs. Roberts, 2 *id.*, 313.
U. P. R. R. Co. vs. McDonald, 152 U. S.,
262.

In this last case, which went upon error from the Circuit Court of the United States for the district of Colorado, the Court below charged the jury as follows:

"The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as the result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable.
* * * It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence."

This instruction was approved by this Court.

It is also urged by the counsel for the defendant in error that any error in the charge of the Court in refusing the instructions asked for by the plaintiffs on trial of this case in the Court below was cured by their failure to except to that part of the charge of the Court which gave the instructions in a modified form. To this we reply, that there was no modification of these instructions. The proposition submitted by the plaintiffs in error in the instructions requested by them was as to the effect of the violation of these rules and regulations upon the question of negligence. The trial court not only refused to give the instructions requested upon this question but omitted entirely to give any instructions whatever upon such question. True it is that the Court charged the jury that the rules and regulations were in force, but in the same connection the jury were instructed in effect that such force was only a shadow, not a reality—the mere *expression of opinion* which had operated as notice of the views of the department as to the danger of transporting diseased cattle, etc.; but nothing was said by the Court to the jury as to the degree of such force or as to the legal effect of such rules and regulations upon this question of negligence, or as to what consideration of them, if any, should be given by the jury in determining such question. (See printed record beginning at the bottom of page 257.)

Where, then, we ask, was there any modification by the trial court of these instructions asked for on the question of negligence arising from the violation of these rules and regulations? And again, even if such modification could be shown,

the exception taken by the plaintiffs below to the charge of the Court was sufficiently definite to save any errors therein contained. This charge, as will be seen (pp. 142-152 of the printed record) was given in paragraphs, plainly separated, and the plaintiffs below objected to "each and every paragraph of them." This is sufficient, as lately determined by the Supreme Court of this state in the case of *Richie vs. People*, 23 Colo., 314. But this doctrine requiring an exception to an instruction which may be a modification of one requested is not the law of Colorado.

K. P. Railway Co. vs. Ward, 4 Colo., 30.

How, then, can opposing counsel contend that "whatever Federal question there may be in the case has been decided in favor of the plaintiffs in error?"

The following four cases are cited in the brief of the defendant in error on this point as to exceptions to instructions:

Beaver vs. Taylor, 93 U. S., 46.

Ayrault vs. Pacific Bank, 47 N. Y., 570.

Walsh vs. Kelly, 50 N. Y., 556.

Regus vs. City of Rochester, 45 N. Y., 129.

The case of *Beaver vs. Taylor*, 93 U. S., 46, is not in point.

In the case of *Ayrault vs. Pacific Bank*, 47 N. Y., 570, after the trial of the case the defendant presented to the trial court sixteen requests to charge, which were refused, and the exception to the refusal is as follows: "To the refusal to charge each of the requests submitted, *except so far as*

embraced in the charge delivered," and the exception to the charge given by the Court is "to every part of the charge which is *inconsistent with such requests,"* and the Court in that case says that the counsel should have taken his exceptions to any omission or refusal to charge as requested, and all which was done in this case upon the refusal of the Court to give the specific instructions presented, after which the exception was taken to the charge of the Court, and which exception was entirely different from that shown in this New York case.

The case of *Walsh vs. Kelley* we have been unable to find. In the case of *Requa vs. City of Rochester*, 45 N. Y., 129, at the close of the trial the defendant's counsel submitted to the Court ten propositions on which he requested the Court to charge the jury. They were in writing and submitted before the charge was given. After the refusal to give such instructions the Court proceeded in its charge to the jury. Some of the propositions were substantially adopted by the Court. At the close of the charge the defendant's counsel excepted to it in all the particulars specified in these written requests "so far as the Court had not charged as requested," and the Court very properly held that such exceptions were unavailing.

"ARGUMENT UPON THE MAIN CASE."

Under this heading, beginning on page 16 of the brief of the opposing counsel, it is sought, first, to repeat all of the previous contention that the Federal questions were decided in favor of the plaintiffs in error, and, secondly, to show that the Court of Appeals rendered a righteous judgment.

As to the righteous character of the judgment in this case, it is not expected that opposing counsel will agree. If our contention that the trial court, in effect, deprived the plaintiffs in error of the benefit of this Congressional legislation and of these Rules and Regulations, by instructing the jury that such rules only operated as the expression of the views of the head of the Bureau of Animal Industry, and, therefore, by necessary inference, had nothing to do with the question of negligence, and if that be all that the plaintiffs below were entitled to have stated to the jury, then, in such case, it may perhaps be true that, so far as the trial court is concerned, we have no right to complain *in this court* of the judgment. Again, if our contention be wrong that the Court of Appeals deprived us of our legal and just rights under this Act of Congress and these Rules and Regulations by an erroneous construction of the Act of Congress as we have contended in our opening brief, and which counsel on the other side have failed to controvert, then it may perhaps be said that, so far as this Court is concerned, the judgment in this case was and is a "righteous judgment;" and, in such case, it would be equally true that during the past fourteen years one of the most important industries in this country has been resting in the belief that its vast interests have been promoted and protected by an Act of Congress and the Rules and Regulations made thereunder, while in very truth it now appears from the judgment in this case, that these Rules and Regulations, even if in force, had no greater significance than an expression of opinion—and,

moreover, that they were without even that significance, because not authorized by the Act of Congress itself, passed nearly fifteen years ago.

Respectfully submitted.

W. C. KINGSLEY,

Attorney for Plaintiffs in Error.

N^o. 153.

FILED
DEC 6 1898
JAMES H. MCKENNEY,
Clerk.

Ad. Reply Bx. of Kingsley for

IN

Filed Dec. 6, 1898.

THE SUPREME COURT

OF THE

UNITED STATES.

MULLEN AND MCPHEE,
Plaintiffs,

vs.

THE ~~GREAT~~ ^{Union} WESTERN BEEF
COMPANY,
Defendant.

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ADDITIONAL REPLY BRIEF OF PLAINTIFFS
IN ERROR.

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.



IN
THE SUPREME COURT
OF THE
UNITED STATES.

MULLEN AND MCPHEE,
Plaintiffs,
vs.
THE ~~GREAT~~ WESTERN ^{*Union*} BEEF
COMPANY, _A
Defendant.

ADDITIONAL REPLY BRIEF OF PLAINTIFFS
IN ERROR.

I.

*That there is a federal question involved herein
no one denies.*

The defendant claims that there are two such questions, while the plaintiffs claim there is only one, viz., the construction of a federal statute, and the rules and regulations made thereunder, while the defendant claims that it properly presented and preserved, and has the right to have determined, the constitutionality of said statute.

II.

Did the defendant present a constitutional question to the trial court?

Did defendant save or waive such question in said court?

Did the defendant present a constitutional question to the Court of Appeals?

Did it save or waive such question?

Does it present any such question here?

First—No such question is presented or hinted at in the answer. The Act of Congress and the rules and regulations thereunder were specially pleaded by the plaintiff, and in answer the defendant not only failed to set up the unconstitutionality of either, but by irresistible implication admitted the validity of both, and affirmatively alleged a full compliance with each. It says:

"Defendant company denies that it transported said cattle * * * from Texas to the state of Colorado * * * in violation of * * * any rule or regulation of the United States Department of Agriculture, or in violation of any Act of Congress, but alleges that any cattle that defendant shipped were transported in strict accordance with the regulations and in pursuance to the particular requirements of such regulations."

(Record, bottom of page 31, top of page 32.)

Second—As shown in the middle of page 50 of record, defendant objected to the introduction of the rules and regulations of the Department of Agriculture of February 5, 1891, as follows:

"As said rules and regulations are not shown to be authorized by Acts of Congress, and any Act of Congress authorizing them is unconstitutional."

"Objection overruled, to which ruling defendant excepted."

We include this exception as it was the only one taken by defendant in relation to this matter.

Third—After plaintiff's evidence was introduced, the defendant made a motion for nonsuit.

(Record, page 190), the 5th paragraph of which is as follows:

"The Act of Congress under which the regulations of the National Board of Health were made is unconstitutional and void, and is itself not authorized by any provision of the federal constitution."

Motion denied and no exception taken.

Fourth—When the evidence was all in (Record, page 253), the defendant asked the Court to give the jury the following instruction:

"10. The Court instructs the jury that the Act of Congress and the rules and regulations made under the same, which the plaintiffs allege to have been violated, are not authorized by the constitution of the United States, and are not valid, subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not of itself be an act of negligence, and you are not to construe a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

"Objected to by plaintiffs as incompetent and immaterial."

There is no entry of any ruling of the Court in reference to this instruction, and no exception of any kind or description was taken by the defendant in reference thereto.

Fifth—The Court's instructions upon the Acts of Congress and the rules and regulations thereunder are to be found in the last half of the Record, page 257 and the first half of page 258. In substance the Court treats the Act of Congress as being perfectly valid, and as to the rules and regulations thereunder the jury were instructed that they:

"Would have the effect to give to this defendant notice that the United States authorities having in charge the animal industries, so far as the government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimball county at that period of the year to Colorado." * * *

There was no exception of any kind taken by the defendant to the Court's charge.

Sixth—When the case on the plaintiffs' appeal was taken to the Court of Appeals, the defendant might have assigned cross-errors under the civil code, which is as follows:

"Exceptions taken to the opinions and decisions of the court upon the trial of a case to the jury shall be deemed to have been properly taken and allowed; and the party excepting may assign for error * * * any decisions or opinion so excepted to * * * ; and the appellee or defendant in error may assign cross-errors in like manner upon the record filed by the appellant or plaintiff in error; which cross-errors shall be heard and the decision rendered thereon at the same time that the cause is considered on the other errors."

Mills' Code, Sec. 386.

No cross-errors of any kind were ever filed or assigned by the defendant in the Court of Appeals.

Seventh—The opinion of the Court of Appeals

found on pages 3 to 9 of the Record shows that no constitutional question was ever considered or passed upon by that court.

Eighth—In all that has been done in preparing this case in the Court of Appeals for this court (See Record, pages 11 to 17) no question was raised or suggestion made by the defendant that this case should go to the State Supreme Court.

Ninth—Had there been a record to justify such action on its part, the defendant might have assigned cross-errors in this court, but it has not attempted to do so.

AUTHORITIES.

The objection made to the ruling on evidence (Record, page 50) and motion for nonsuit (Record, page 190) and instruction 10 (Record, page 253) is *too general*.

We quote from 1 Thompson on Trials, section 693 :

"When evidence is objected to * * * if the party would save an objection to the ruling, if adverse to him, such as will be available on appeal or error, he must form his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in the bill of exceptions. He waives all grounds not so specified. The reason of the rule is two fold. First, to enable the trial judge to understand the precise question upon which he is to rule and to relieve him of the burden of searching for objections which counsel is unable to discover or which they see fit to conceal." * * *

(Many authorities cited, several of which are from this Court.)

See also—

Higgins vs. Armstrong, 9 Colo., 57.

Farmers' Ins. Co. vs. Nixon, 2 Colo., App.,
266.

D. T. & Ft. W. R. R. Co. vs. Smock, 23
Colo., 456.

We quote from

Hulett vs. M. K. & T. Ry. Co. 46 S. W.
Rep. 951.

"Among the instructions asked by the defendant and refused by the trial Court was this one:

"To hold the defendant liable in this case would violate its rights guaranteed by the constitution of the state of Missouri and of the United States, and would deprive the defendant of its property without due process of law.' * * * As to the generalities contained in the instruction mentioned, relative to the constitution of this state and of the United States, it suffices to say that neither the court below nor this court have any call to search through the respective organic laws of the state and nation in order to find out in what particular either of them may have been supposed to have been violated. The Court therefore did right in refusing the instruction." * * *

"Inasmuch as we hold there was no constitutional question presented to the lower court, and inasmuch as the amount sued for and recovered does not come within the appellate jurisdiction of this court, we order this case transferred to the Kansas City Court of Appeals."

There was no constitutional question before the Court of Appeals.

If we are wrong in saying that the general objections made by the defendant in the trial court could not present questions for review, then it could only retain such questions in the record by assigning cross-errors thereon in the Court of Appeals, but this it did not do.

The City of Spring Valley vs. The Spring Valley Coal Co., 50 N. E. Rep., 1067.

The city was sued by the coal company on a state statute, making the state liable for damages done by a mob. Judgment in the trial court was in favor of the city. The coal company appealed to the appellate court, where the judgment below was reversed and (under a statute), judgment rendered against the city for amount of damages sustained by the coal company. City appealed to the Supreme Court. It was held that as the city had reserved no exception to the action of the trial court in refusing an instruction asked by it to the effect that the act was unconstitutional on which the suit was brought, and had filed no cross-errors in the Court of Appeals, that the question of the constitutionality of the statute was not before the Court.

Many cases might be cited in Colorado where the defendant in error has availed himself of assigning cross-errors to his great advantage. We will cite, however, but one:

Knights of Honor vs. Wollschlager, 22 Colo., 214 and 216.

Further, in relation to the duty of assigning

cross-errors and the waiver of all questions upon which such errors are not assigned see:

Beckwith vs. Beckwith, 11 Colo., 568.

Layton vs. Kirkendall, 20 Colo., 236.

Marean vs. Stanley, 21 Colo., 44.

Sargent vs. Board Co. Com., 21 Colo., 158.

Robinson vs. D. & R. G. R. R. Co., 24 Colo., 98.

Persse vs. Gaffney, 23 Colo., 246.

Sargent vs. La Plata Co., 21 Colo., 161.

The defendant's answer raises no such questions, but pleads a compliance with the statute and rules.

Vaughn vs. W. B. R. R. Co., 46 S. W. Rep., 952. In this case, upon a similar plea, the Court declares that the validity of the statute is not in question.

To be available in the Supreme Court of the United States the answer should specially set up the unconstitutionality of the act.

Levy vs. San Francisco, 167 U. S., 175, and authorities cited.

IV.

Und r no consideration was it possible for us to take this case to the Supreme Court of Colorado.

Had the Court of Appeals extended its present decision and passed, also, upon the constitutional question against us, still our only redress was to come to this Court.

This Court has repeatedly held that where there are two grounds for the judgment, only one of which involves a federal question and the other

is broad enough to maintain the judgment, the Court will not look into the federal question.

163 U. S., 207.

By the statutes of Colorado the Supreme Court of that State could not take jurisdiction on appeal or writ of error to the Court of Appeals, unless a construction of a provision of the United States or the State constitution was necessary to a determination of the cause.

Had the Court of Appeals also passed upon and decided the constitutional question against us, its opinion would have rested upon two grounds (both federal questions), either one of which would have supported its judgment. Had we taken the case to the Supreme Court of Colorado, the record would have presented one question of which it might have jurisdiction under certain conditions, and another of which it had no jurisdiction. It could only take jurisdiction of the constitutional question when necessary to the determination of the cause, but it would not be necessary for the judgment would have sufficient support upon the other ground. The Supreme Court of Colorado has several times passed directly upon this matter. We now quote at length the opinion of *Madden vs. Day*, 24 Colo., 418.

"In reviewing the judgment of the District Court, the Court of Appeals held that the lien of an attachment writ, secured by its levy before the passage of an act repealing that particular ground of attachment under which the writ issued, was still preserved; although the repealing act contained no special saving clause to that effect. The

conclusion was based upon two grounds: First, that section 11 of article 2 of the constitution forbids the enactment of retrospective legislation, and as the lien, given under the repealed statute, constituted not merely a remedy, but a fixed, substantial or vested right in the creditor, the repealing statute, if interpreted as destroying, or attempting to destroy, such a lien, would contravene said section 11; hence the statute, if held valid at all, must be construed, as it may be, so as to affect, or apply to, such levies only as are made subject to its enactment. Second, the repealing act containing no provision to the contrary, the general saving clause statute (Session Laws, 1891, page 366; Mills' Ann. Stats., sec. 4189a)—whose object is to protect prior rights and remedies—is to be read into it, so as to except from its operation previously acquired liens. *Day vs. Madden et al.*, 9 Colo. App., 464 (48 Pac. Rep., 1053).

"It will thus be seen that a resolution of either one of these propositions against the plaintiffs in error here (who were the defendants in the attachment suit) necessarily determines the case against them. The Court of Appeals, however, elected to rest its decision, not merely upon the interpretation given by it to the statutes, but as well upon the constitutional ground mentioned. The reason for so doing is thus expressed by the learned writer of the opinion:

" 'We have preferred, however, to put our decision on constitutional grounds, as well as on these general considerations. This has been done to protect, as far as we could, the rights of the pres-

ent litigants, as well as to conserve the rights of other suitors whose interests may be affected by this opinion. Unless we are incorrectly informed, this matter has been before the various district courts of the state many times since the act of 1895 went into operation. We are likewise advised by the profession that the district courts have divided on the question, many judges holding one way and many the other, which demonstrates to our mind that the question is a close one, of great perplexity and uncertainty, and one on which courts might well differ and support their conclusions with almost equally persuasive reasons. Our district courts are presided over by men of large experience and learning in the profession, and their opinions are entitled to great weight and respectful consideration, and, while they differ on this question, we regard it as only just and proper that we should unhesitatingly and fully express our views, *decide the constitutional question according to our best judgment, and put our decision on that ground that the parties to this suit, as well as other litigants in the state, may ultimately have the maturer, and probably more satisfactory, conclusion of the Supreme Court upon this question.*' 48 Pac. Rep., 1058.

"The language peculiarly appropriate to the present discussion we have italicised.

"While the motive, as thus expressed, may be praiseworthy, yet it does not follow that jurisdiction may be conferred upon this court, either because the question is one of importance or that the inferior courts and litigants desire a decision by this tribunal. Our jurisdiction, by writ of error or ap-

peal, if it exist at all, is conferred by the constitution or statute applicable to appellate proceedings, and not as the result of a desire, even though universal among subordinate courts, the profession and litigants, that we determine any particular legal proposition.

"This court has repeatedly held that, unless a constitutional question is fairly debatable, and has been properly raised, and is necessary to the determination of the particular controversy, appellate jurisdiction upon that ground does not exist. The case of *Hurd vs. Carlile*, 18 Colo., 461, is practically decisive of this motion. There the Court of Appeals rested its decision wholly upon an interpretation given by it to a statute, although a constitutional question was raised by counsel and pressed upon the Court, which the latter refused to consider, because the case went off upon the other proposition, viz., the meaning of the statute.

"In the case at bar, the Court of Appeals, it is true, predicated its ruling not wholly upon the statutory ground, but upon that and an additional and constitutional one. But the conclusion reached upon either one of these is decisive of the case against the plaintiffs in error here. The one ground is purely statutory; the other involves the determination of the question whether or not this repealing statute is in violation of a constitutional provision.

"The learned Court did not say that the latter question was necessary to a determination of the controversy. Indeed, it virtually held (and this must be so) that the other considerations, viz : the interpretation which it gave to these statutes necessarily determined the very merits of the case against

the party who here seeks a review. But because, in the opinion of the Court, the question determined was difficult, and the principle important, and one that was determined differently by different district courts, the reviewing tribunal proceeded to give another ground for its decision, viz: a constitutional one; which, in case it is essential to a determination of the controversy, invokes the jurisdiction of this Court. The fact that, in the case of *Hurd vs. Carile*, supra, the Court of Appeals refused to decide a constitutional question, although it was clearly not so essential, does not except the latter case (the one now before us) from the principal announced by us in the former case. In other words, the injection of a constitutional question into a decision of an inferior court, by the latter, when the same is not necessary to a determination of the case, does not thereby invoke the appellate jurisdiction of this Court. In principal the case is like that where the parties themselves, by agreement, attempt to confer jurisdiction. But this is not possible. *Arapahoe County vs. Board of Equalization*, 23 Colo., 137. The feasibility or expediency of securing the decision by this Court is not made by the constitution or the statute a ground of its appellate jurisdiction.

"A decision of a constitutional question is always approached by courts with caution, and more or less reluctance, and is not made unless the necessities of the case require it.

"In a proper case we will not evade the responsibility or duty to determine such questions; on the contrary, we will meet it. But this Court is restricted by law, in its appellate jurisdiction, to cases particularly designated. As this is not one of them,

the writ of error should be dismissed, and it is so ordered."

See also—

Board of Co. Com. vs. McIntire, 23 Colo.,
137.

Hurd vs. Carlile, 18 Colo., 461.

McCandless vs. Green, 20 Colo., 519.

ACTS OF CONGRESS AND RULES.

As Acts of Congress, on account of the vast territory over which they operate and the intricacies of the subjects treated, must be quite general in character, it is often the case that they do little more than declare the policy of the government in relation to the subject-matter, and throw upon the executive department or certain officers the enforcing of such policy by appropriate rules and regulations. From the foundation of the government down to the present, such rules and regulations, promulgated under authority of Congress, have always been considered as having the full force and effect of laws. The Acts of Congress in relation to the postoffice department, the public lands, the revenues, etc., etc., do not, in themselves, perhaps, have one-fourth of the laws that are daily applied in such departments. In the early case of the *United States vs. Bailey*, 9 Peters, 238, there was no grant of authority under the Act of Congress to make rules and regulations, and still this Court said, through Justice Story:

"We are of the opinion that the Secretary of the Treasury did, *by implication*, possess the power to make such regulation and to allow such affidavits in proof of the claims. It was incident to his duty. It is a general principle of law in construc-

tion of all power of this sort, that where the end is required the appropriate means is given."

In this case the defendant was found guilty of the penitentiary offense by virtue of a rule that the secretary was held to have power to make simply by implication. See, also, the following cases:

Adams vs. Freeman, 50 Pac., 135.

United States vs. Eaton, 144 U. S., 677.

13 Peters, 498.

101 U. S., 755.

Armstrong, 113 Wall., 154.

In fact, the Act of Congress under consideration declares, in Section 6, that a certain offense shall exist by virtue of the notice provided for in Section 7. In the opinion of the Court of Appeals of Colorado, in the case at bar this language is used:

"It may be considered for the purpose of the case that rules and regulations made by direction of a statute have the authority of the statute itself, and that their violation is in effect a violation of of the statute, but that such may be the case they must be clearly within its terms."

There is in effect no contention between the parties to this suit as to the power of Congress to legislate on the subject-matter, and that it could rightfully grant to the Secretary of Agriculture, and he could rightfully exercise the power of making rules and regulations under such act, but the real contention is that *the rules and regulations introduced in evidence are outside of the authority granted by Congress*. By Section 3 of the act it is declared:

"That it shall be the duty of the Commissioner

of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases."

We shall see presently that the Court of Appeals does not question but what this authority is broad enough, but attempts to avoid the proposition. After disposing of one or two preliminary questions, we will take up the opinion and examine it.

EXCEPTIONS TO INSTRUCTIONS.

It is claimed by the defendant that we are not in a position to complain, on account of the instructions asked by us and refused by the Court or on account of errors in the Court's charge.

The illustration by defendant on page 15 of its argument applies very aptly and with great force to its own condition, as shown by the record, but it fails in every respect to apply to us.

The defendant asked certain instructions. No exception of any kind was taken by it to the Court's action in reference thereto. Neither did it in any manner except to the charge of the Court or any part thereof.

On the other hand we claim that we have properly saved exceptions to the refusal of the Court to give each of the four instructions asked by us, and have properly saved exceptions, also, to each paragraph of the Court's charge. With the authorities cited by the defendant, holding that when the Court instructs orally, the parties excepting to such charge, should call the attention of the Court to the specific matter of objection, so that the Court may know why he excepts, or the reason

of his exception, we find no fault. The reason of the rule is stated in the three cases cited, to-wit: 16 Colo., 17 Colo., and 140 U. S. It will be noticed, however, that 17 Colo. shows affirmatively that the defendant is in error in saying each of the instructions asked by us and refused by the Court, cannot be reviewed, for there the identical question was before the Court, and it treats the exception to instructions refused as being properly saved. The reason given in all three of these cases for refusing to consider the general exception to the charge, does not exist in the case at bar, and we think we are safe in saying that the defendant cannot find a case that will support its contention as applied to our exceptions in this case. When the reason of a rule ceases, the rule itself ceases. Whether the Court instructs orally or in writing, it is entitled to know the position of the parties in reference to its instructions, and, when that position has been fully pointed out to it and made clear and plain, then all that the law requires has been done.

Exceptions do not mean a renewal of the legal argument.

The plaintiff, at the close of the case, says to the Court:

"I ask your honor to instruct the jury on each of the points set forth in the four several instructions, which I now present to you," and then proceeds with his legal argument.

The Court, after instructing the jury, says to the plaintiff:

"I have considered carefully each instruction asked by you, and your reasons in favor of them,

and I differ with you on the law, as you notice from the charge I have given to the jury. I have therefore refused each of the instructions asked."

The plaintiff replies:

"I adhere to the law as stated in each of the instructions asked, and ask your honor to note several and distinct exceptions to your action in reference to each of them. Further, in order that I may doubly save myself, I wish an exception noted to each and every paragraph of the instructions given by the Court."

The Court, in compliance with the request, grants each exception requested.

We now quote the most recent decision of our Supreme Court upon this question, *Richie vs. People*, 23 Colo., 329:

"The instructions in this case, thirty-nine in number, are in separate paragraphs and separately numbered. The exceptions to these instructions were taken as follows: 'And to the giving of which instructions, and to each and every of them, the defendant, by his counsel, then and there duly and severally excepted.' This is the usual and customary manner of taking exceptions where the charge is written and in numbered paragraphs. Perhaps in three-fourths of the cases brought to this court the exceptions are not otherwise taken. That is a better system of practice which requires counsel at the time instructions are given to come forward and minutely specify their objections to the same. But we all know that in the haste of *nisi prius* trials this is seldom done. * * * This Court, while condemning the practice which permits exceptions to be reserved as in this case, has

never refused to consider such exceptions, if made to instructions duly paragraphed and numbered, although it has refused to review such exceptions when the charge is general and delivered orally. In the case of *Miller vs. The People*, 22 Colo., 530, the charge excepted to was given orally as a general charge. In *Keith vs. Wells*, 14 Colo., 321, and *Edwards vs. Smith*, 16 Colo., 529, the instructions were given in the nature of a general charge, and the Court held that a simple statement at the close that counsel desired an exception to each and every instruction was not sufficient. These cases proceed upon the basis that an oral charge is not as carefully prepared as a written charge, and that counsel, being listeners, are more apt to detect errors than the Court. The case of *K. P. Ry. Co. vs. Ward*, 4 Colo., 30; the Court there held that when the instructions are in the nature of a general charge, excepting to each and every of the instructions will not avail, but in that case the instructions *refused*, being numbered, a like exception was held sufficient. In reference to the instructions refused, the Court says: "They are a series of separate and distinct propositions of law, each standing independent and alone, and against each of which the Court was enabled to write on the margin the words "given" or "refused." They each enunciate some rule of law which the appellant claimed at the trial should be given. As it was necessary for the Court to either give or refuse them separately, each and every instruction was, therefore, *called to the attention* of the Court, and the exception to the ruling of the Court in refusing to give such instructions, and each and every of

them, was held sufficient, although the instructions refused were in that case not numbered.' ”

In *Victor, etc., vs. Fraser*, 2 Colo. App., 14-17, the Court says:

“The defendants requested instructions relative to the law of agency (which were correct). * * * That they were entitled to have the jury instructed upon that subject was undoubtedly true. The Court neither gave the instructions asked nor any which were equivalent to them.”

In *Finnerty vs. Fritz*, 5 Colo., 181, it is said:

“No specific instructions were given upon either of the foregoing propositions. * * * It is true no such instructions were prayed by the defendant, but the Court rejected instructions which were prayed on the subject of appellee's misconduct, and gave others instead upon its own motion. In such case it became the duty of the Court not only to instruct *correctly*, but fully on the subject.”

See also *Gibbs vs. Wall*, 10 Colo., 153.

Rose vs. Otis, 18 Colo., 59-62.

We confess we do not understand how the defendant can raise the question it seeks to raise upon our exceptions. The Court of Appeals, while it refers to some exceptions upon which it did not pass, because not properly saved, nevertheless does enter into the matter of the exceptions presented upon these instructions and the charge of the court. Having done so and passed upon the statute and the rules and regulations, we cannot see how the defendant can be heard to say that it did not do so rightfully, and as we have properly assigned errors upon the judgment of the Court of Appeals, those assignments must be con-

sidered by this court. It will be noticed in all the cases cited where the court instructed orally, and there was a general exception thereto, or there was a general exception to the written charge, that the reason assigned for not considering such exceptions is that the court's attention was not directed to the particular matter complained of. That reason does not exist in this case. The instructions asked fully advised the court as to the contention of the plaintiff in regard to the law.

ERRORS IN THE OPINION OF THE COURT OF
APPEALS.

By its opinion the Court of Appeals held:

First—That the regulations of February 5th and April 23, 1891, never went into effect, because Colorado did not agree to them.

Second—Said rules were made under Section 7, and are only authorized by Section 3, and not by Section 7.

Third—The restrictions upon transporting cattle are in Section 6, and "it contains all the regulations that Congress regarded necessary."

Fourth—"After their arriving (the cattle) in the State," Congress could not further control the action of the shipper in reference to them.

In the case of *M. K. & T. Ry. Co. vs. Haber*, 18 Supreme Court, Rep. 488, these rules and regulations were before the Court and were treated as a part of the law in the case. It seems that no one thought of raising the objections thereto that we have in the case at bar.

The power given by Section 3 of the Act "to prepare such rules and regulations as he might

deem proper for the speedy and effectual suppression and extirpation of the disease referred to," it is conceded is ample to justify the rules and regulations in controversy, and of said rules the Court of Appeals said:

"They were doubtless conceived in wisdom, and if they could be enforced we see no reason to doubt that the results would be beneficial."

Let us examine the Objections of the Court of Appeals enumerated in their order.

It will be noticed that it is made the "duty" of the Secretary to prepare rules and regulations and certify them to "each" state and territory. There is nothing said in the act about such rules being inoperative until each state and territory should agree to them. These rules are laws and regulations established by Congress in relation to interstate commerce, a matter over which the states have no jurisdiction. They do not affect states alone, but also the export trade. The sentence is complete in itself that requires the Secretary to promulgate such rules and regulations. Suppose the states and territories do not respond to his "invitation," are the rules that he was authorized to make, thus made inoperative or repealed? Suppose that a few of the states respond and the rest do not, there is nothing in the statute that says that the rules shall be in force ~~only in~~ those states that do respond or that money shall be expended alone in such states. It reads:

"Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any state or territory in which pleuo-pneumonia or

other contagious, infectious or communicable disease is *declared to exist*, or *such* state or territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a state or other properly constituted authority signify their readiness to co-operate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much money appropriated by this act as may be necessary in such investigation and in such disinfection or quarantine measures as may be necessary to prevent the spread of the disease from one state or territory to another."

If this may be called an exception or a proviso, we find that it all relates to the expenditure of money appropriated and not to the validity of the rules. Such being the case, it can not be said that the rules did not go into effect from the date of their promulgation. The governor of a state may have the authority to offer a reward in the nature of compensation to those who may arrest and convict one of murder, but murder is murder, whether such compensation be offered or not. Again, we notice that the condition in reference to this expenditure is that if the plans of the Commissioner shall be accepted by "any state" in which such contagious or infectious disease is "declared to exist." This language evidently means the Southern States, and it refers to the ^{notification} ~~declaration~~ to be made by the Secretary under Section 7. Such disease never has been declared to exist in Colorado. It does not exist there. Colorado, then, was not one of the states that had to agree to this rule, even if the construction of the Court of Appeals was otherwise correct.

The last part of the section, namely, that in reference to the governor of a state, etc., shall signify their readiness to co-operate, etc., the Commissioner is authorized to expend so much money, etc., can not be said in any sense to even intimate that the rules previously promulgated by the Secretary should not be enforced. The rules controlling shipments from state to state must necessarily be enforced in order that the Secretary may properly govern foreign shipments. Give the section such construction as we may, the taking effect of the rules is not made to depend upon the expenditure of the appropriation, for, at best, the Secretary can only spend money when "necessary." The making of an appropriation to carry into effect the Act of Congress was simply intended to add strength to the power given. We have also called attention in our former brief to the fact that the appropriation of 1890 was made without anything being said as to the states accepting the rules, and these rules were made after that appropriation. So these frivolous objections have nothing on which to stand. The rules themselves declare that they are promulgated under the acts of 1884 and 1890.

Such a construction of a statute as is here contended for will never be given by a court unless it is impossible to escape such a conclusion.

United States vs. Langston. 118 U. S., 389.

Wood vs. United States, 16 Peters, 342.

Sutherland on Statutory Construction, Sections 148, 149, 150, 151, 152, 153 and 217.

The second proposition laid down in the opinion of the Court of Appeals is: That the rules

were made under Section 7, when they were only authorized by Section 3. This proposition is used as a two-edged sword by the Court—to strike down the rules when Section 7 is referred to, as being without authority thereunder, and when Section 3 is referred to, to declare that the power granted by it has never been exercised.

So far as notice of the infected district is concerned, it is admitted that the rule was proper under Section 7, and that the notice was operative as being given under that section, but it will be noticed that the rules refer to both Acts of Congress and call attention to the titles thereof.

If the Secretary had not referred to any Section or Act of Congress, will it be said his rules would not be operative? He might have said, "by authority of law," or he might have remained perfectly silent as to his authority. Suppose, by mistake, he should miss the section of the act in attempting to refer to his authority, does it vitiate the law that actually conferred such authority? The question is not whether the Secretary correctly cited his authority, but whether he had the authority or not. Suppose that "A," having a power of attorney to sell and convey lands of "B," in attempting to exercise this authority deeds as attorney in fact, and leaves his power of attorney to speak for itself, is not this sufficient? On the other hand, suppose that he attempted to describe it, and he made a mistake, as to its date, the book in which it was recorded and the page of the book, would the deed made by him be void? or would it simply be a question as to whether in "fact" he was authorized to make such a deed, regardless of

the mistake he may have made in describing his power? Let us bring the illustration nearer. Suppose he had given correctly the date of his authority and the book and page where recorded, but had referred to one or two sentences therein for the power he claimed to exercise, and it should turn out that those particular sentences did not justify his action, but other sentences following did, beyond question, justify such action, would his act be void? It seems to us these questions are quite plain and simple. They carry us back to the real matter of contention, as to whether the Secretary had authority or not. It is the substance we should look for, and not the form.

Davis vs. Bruce, 82 Ill., 544.

Warner vs. Ins. Co., 109 U. S., 357.

Lee vs. Simpson, 134 U. S., 572.

Third—It is said by the Court of Appeals that the restrictions of Section 6 contain all the regulations that Congress thought necessary, hence the secretary cannot by rules add others. If this be so, why did Congress confer upon the secretary power to make rules, and make it his "duty" to prepare such rules and regulations as he might deem proper. Congress did consider something else necessary than the relief that might possibly be obtained in Section 6. This is shown by every section in the act. Under Section 6 the defendant might have been convicted if he brought diseased cattle into this state from Texas, knowing they were affected with fever. This section simply provided as to what should constitute a crime. Suppose the defendant did not know the cattle were

diseased. Suppose that he claimed that he was shipping cattle that were perfectly sound. The secretary's rules would cover the shipment of sound cattle. They add certain items of care that should be observed in the shipment of all cattle, whether diseased or not, or whether the shipper knew of the disease or not. This care in the opinion of the secretary was necessary, owing to the prevalence and ravages of this disease, in order to suppress and extirpate the same. But we have seen that Congress did not aim that Section 6 should be the only remedy provided for, as stated by the Court of Appeals, otherwise the authority to the secretary and the appropriations made would be wholly unnecessary. It might be further said of these rules that they are directly in line with the Act of Congress and its authority in reference to interstate commerce, for they aim to protect other cattle in other states that are the subjects of interstate commerce at the time when they are brought in contact with the diseased cattle.

Fourth—The fourth and last objection given in the opinion of the Court of Appeals, is that after the cattle arrived in this state Congress, (and, therefore, the Secretary's rules) could have no effect upon the liability of the shipper in reference to them. Such a construction of the power of Congress would simply deprive it of the privilege of doing any good, while at the same time, the subject matter being within its particular province, state legislatures are necessarily restricted. This court has never to our knowledge so interpreted any power of Congress, and we have faith that it never will. The man that undertakes to ship cattle from

Texas to Colorado, in accordance with the law of Congress must be held to comply with the act under which he claims protection. It was said in *Barnett vs. Barber*, 1 Littell (Ky.), 396:

"We admit that an individual whose rights are prejudiced by a law conflicting with the Constitution, has a right to demand of the judiciary a decision on the validity of the law. * * * But such individual ought to show that his constitutional rights were infringed without his consent, and ought not to jeopardize his rights voluntarily by attempting to proceed under a law, and take the benefit of it, and then turn around and complain of constitutional injuries."

See also *Hansford vs. Barber*, 3 A. K. Marsh, 515.

If Congress can fix the terms and conditions that so regulate such commerce, if its authority does not stop at state lines, but enters the state together with the article transported, and guards it against the operation of state laws for months, and it may be for years—that is, so long as the article shipped retains its original character, and until by barter and sale or the direct effect of internal commerce, it has become so mixed and mingled with such internal commerce as to be a part thereof; then we are unable to see why Congress may not make regulations and rules as to how it shall be so handled up to the time that it has completely lost its identity as an article of interstate commerce. Especially is this true when the expressed object of the rules in question is to protect other objects of interstate commerce. The man from California shipping cattle through Colorado or the Montana man who has cattle upon its ranges for shipment, or the

Colorado man preparing his cattle for shipment to the Eastern market, have as much right to protection as the Texas man who brings his cattle into this State, and these rules refer especially to the protection of cattle that are to be shipped to an Eastern market. This power of Congress will be construed so that it may be of some benefit, and a benefit to all. We think the decisions of this Court come fully up to what we claim.

Gloucester Ferry Co. vs. Pennsylvania, 114
U. S. 196.

Leisey vs. Hardin, 135 U. S. 100-108.

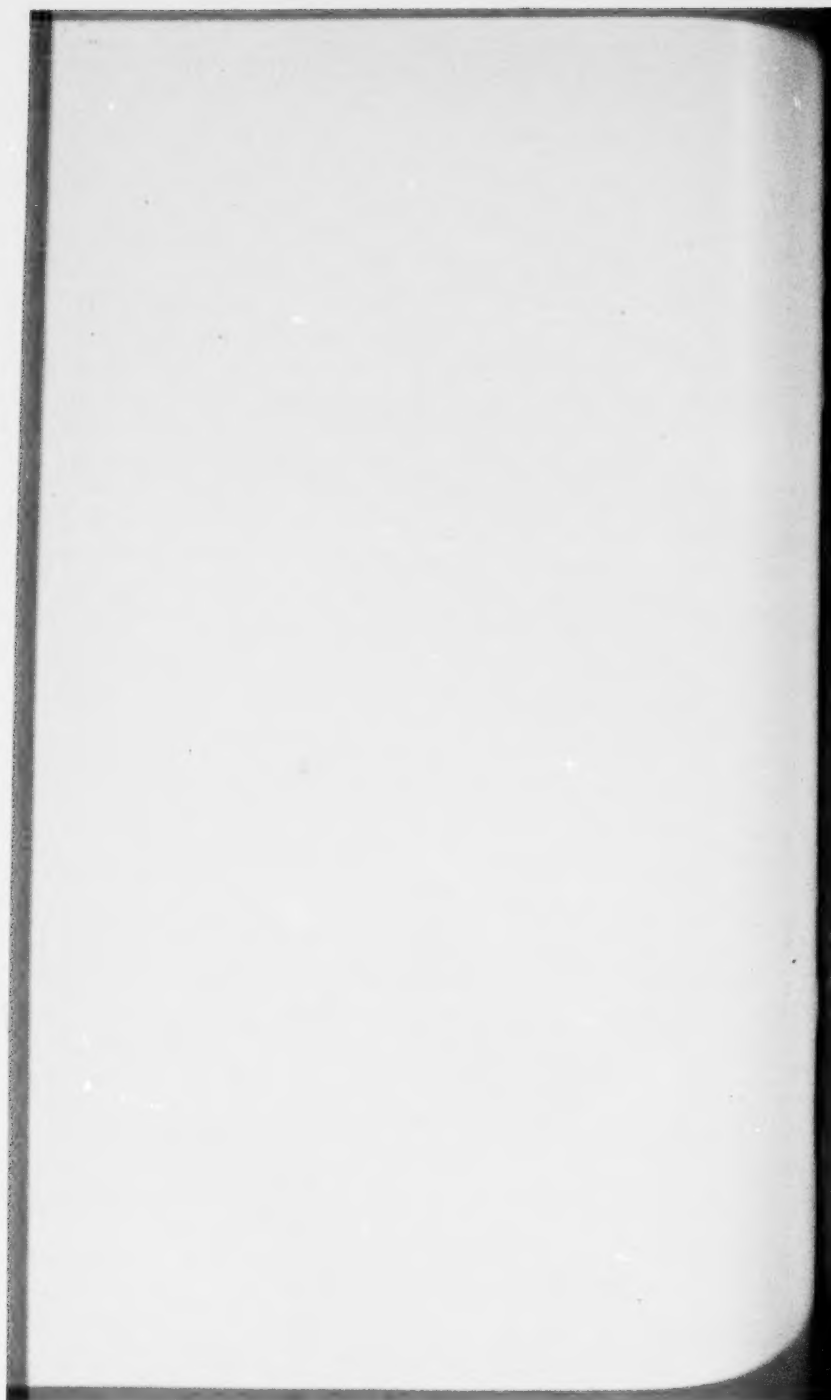
White's Bank vs. Smith, 7 Wall, 655-6.

United States vs. Boston & A. R. R. Co.,
15 Fed. 209-211.

United States vs. State, 91 U. S. 279.

Respectfully submitted,

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.



No. 153.

FILED

OCT 4 1898

By *of Thomas & Bryant for* *10*
IN THE

JAMES H. MCKENNEY
CLERK

SUPREME COURT
Filed Oct. 4, 1898.

UNITED STATES.

OCTOBER TERM, 1898.

JOHN K. MULLEN AND
CHARLES D. McPHEE,
Plaintiffs in Error,

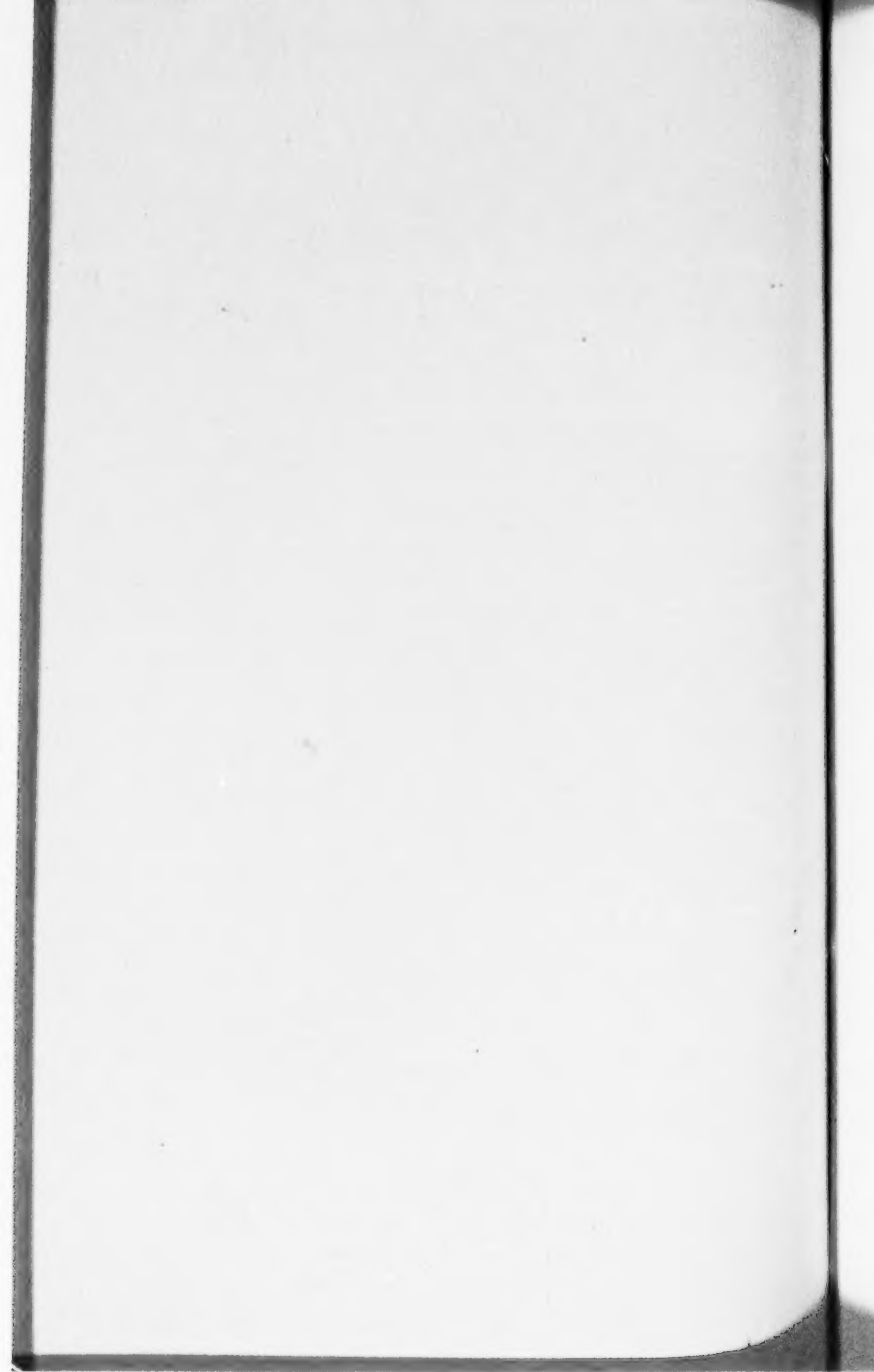
vs.

THE WESTERN UNION
BEEF COMPANY,
Defendant in Error.

No. 153.

STATEMENT AND BRIEF OF DEFENDANT
IN ERROR.

C. S. THOMAS,
W. W. BRYANT,
H. H. LEE,
Attorneys for Plaintiffs in Error.



IN THE
SUPREME COURT
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CHARLES D. MCPHEE,
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No. 153.

STATEMENT AND BRIEF OF DEFENDANT
IN ERROR.

This is a writ of error to the Court of Appeals of the State of Colorado. The defendant in error has filed a motion to dismiss the writ, upon the ground of want of jurisdiction. The plaintiffs in error have filed a brief in which some of the points that are

involved in our motion to dismiss are also argued. We think it would be better, however, to state our position and submit our authorities upon the motion to dismiss the writ of error separate from our argument of the main question.

Motion to Dismiss Writ of Error.

The motion to dismiss is based upon two grounds: (1) There has been no decision of this case by the highest court of Colorado having jurisdiction of the same; (2) whatever federal question there may be in the case has been decided in favor of the plaintiffs in error. We will discuss each of these questions separately:

First: There has been no decision of this case by the highest court of Colorado having jurisdiction of the same.

The first clause of section 25 of the Judiciary Act compels parties to exhaust every remedy in the State courts before attempting an appeal to this highest of federal tribunals. In the case at bar this provision of the statute has not been complied with. This is a damage suit which was begun in the District court of Arapahoe county, Colorado, by J. K. Mullen and Charles D. McPhee against The Western Union Beef Company. A trial was had in that court resulting in a verdict for the defendant. The plaintiffs sued out a writ of error to the Court of Appeals of the State of Colorado, where the judgment of the lower court was affirmed. The present writ of error was then sued out to this judgment of the Court of Appeals. Our contention is that the plaintiffs in error should have taken the case to the Supreme Court of Colorado and had a decision, before any authority is given to come direct to this court.

The Supreme Court of Colorado is the highest tribunal of that State. Until 1891 it was the only

appellate tribunal of any kind. The legislature of that year created the Court of Appeals to relieve the congestion of business in the Supreme Court. The new tribunal was given appellate jurisdiction in the first instance of all final judgments of district courts. In certain cases the Supreme Court retained jurisdiction, by writ of error, either direct to the district courts or to the Court of Appeals. But the Supreme Court was given final jurisdiction of all cases involving a construction of the State or Federal Constitution. Sections 1 and 4 of the act are printed in the brief of counsel for plaintiffs in error, at page 3. We quote from section 4, which defines the jurisdiction of the Court of Appeals:

“It shall have jurisdiction, *not final*, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State or of the United States is necessary to the decision of the case.”

And the last section of the act confers jurisdiction upon the Supreme Court of these excepted cases. But a quotation from the first important case construing this act by the Supreme Court of Colorado will suffice on this point. The court said:

“It is suggested by counsel that this court is without authority to review the judgment of the district court in this proceeding. It is conceded that if this court has jurisdiction since the enactment of the statute creating the Court of Appeals, it is by virtue of the proviso in the first section of the act creating that court, by which the jurisdiction of this court is retained where the construction of a provision of the constitution of the State or of the United States is necessary to the determination of a case.

“The object of providing for the jurisdiction of this court in all cases where

constitutional questions are involved is that questions of such grave importance, affecting the organic law of the State and the power of the legislative, executive and judicial departments, should be determined by the highest court in the State. In several States intermediate courts of review have been created, but the provisions fixing the jurisdiction of such courts are far from uniform. The section in force in this State does not appear to have been copied, even in substance, from the laws of any other State. It has the merit of being couched in as direct and positive language as could well have been employed.

“Under the proviso, whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error will lie from the final judgment to this court. It matters but little how such question is raised, whether by the pleadings, by objections to evidence, or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it. It is obvious, however, that some limitation must be placed upon the foregoing proviso, otherwise every case might be brought into this court, and thereby the power and usefulness of the Court of Appeals destroyed. It is clear that mere assertion that a constitutional question is involved will not be sufficient to give jurisdiction. It must fairly appear from an examination of the record that the decision of such question is necessary, and also that the question raised is fairly debatable. Our attention has been called to a number of cases in which this question has been raised under statutes, which although dissimilar from the one in force in this State, the decisions are valuable as authorities in support of the conclusion that the constitutional question involved

to give the court jurisdiction must be fairly debatable, and not based on mere assertion. To this extent, at least; the authorities are uniform. See Elliott's Appellate Procedure, sec. 33; *The City of Cairo vs. Bross*, 99 Ills. 521; *Chaplin vs. Commissioner of Highways*, 126 Ills. 264; *Benson, Administrator, vs. Christian*, 129 Ind. 535; *Williams vs. Louisiana*, 103 U. S. 637.

"The statute creating the Court of Appeals has been in force in this State but a short time, and it is obvious that the practice under it can only be developed and become settled as the result of experience and judicial decision from time to time as questions shall be presented. We shall not undertake to determine in this case, nor is it necessary to determine, whether or not constitutional questions which have once been determined by this court can thereafter be considered open to controversy to the extent of furnishing ground for jurisdiction in subsequent cases in this court.

"Under the foregoing provision, whenever the construction of a constitutional provision, State or National, is necessary to a determination of a case, the court has entire jurisdiction of the case, not only of the constitutional question, but of all other matters necessary to a complete determination of the controversy. The same result would necessarily follow from the well established rule that the incidents of a class of cases follow the class. This rule is now universally recognized. Any other would distribute the cases by piecemeal between the two courts of review, involving our litigation in hopeless and inextricable confusion. Elliott's Appellate Procedure, sec. 36; *Smith vs. Newberne*, 70 N. C. 14; *Cook County vs. McCrea*, 93 Ills. 236."

Trimble vs. People, 19 Colo. 187.

Counsel for plaintiffs in error concede this much, but insist that no constitutional question is involved in this case. An examination of the record, however, will show that the defendant insisted from the very beginning that the act of Congress relied upon by the plaintiffs was unconstitutional if it authorized the regulations issued by the Secretary of Agriculture. When the plaintiffs opened their case to the jury, the very first offer of evidence made was of a certified copy of certain Rules and Regulations of the Department of Agriculture, which it was claimed the defendant had violated. These were objected to by the defendant upon two grounds: (1) That the said rules and regulations had never been authorized by any act of Congress; and (2) any act of Congress authorizing the same would be unconstitutional and void. This objection was overruled, and the defendant noted an exception. The regulations (Transcript of Record, page 50 (folio 55)), were then introduced in evidence and a large amount of testimony concerning other points given, and the plaintiffs then called Mr. Jordan, a special agent of the department of agriculture. When he was asked concerning the quarantine rules and regulations and any violation of the same, counsel for defendant again objected for the reason that Congress had no authority to authorize such rules and regulations, and that the act of Congress itself did not, as a matter of fact, authorize these particular ones. Considerable discussion was had at that time, and the objection was again overruled and an exception saved.

Transcript of Record, page 141.

The same objection was renewed all the way through the plaintiffs' testimony, always overruled and exceptions saved. At the close of plaintiffs' case, a motion for nonsuit was made by the defendant upon several grounds, the fifth of which was:

“The act of Congress under which the regulations of the National Board of Health were made is unconstitutional and void, because it is not authorized by any provision of the Federal Constitution.”

Transcript of Record, page 190.

This motion was denied and an exception saved. At the end of all the evidence the defendant asked for a number of instructions, of which number ten was as follows:

“The court instructs the jury that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated, are not authorized by the Constitution of the United States, and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not, of itself, be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case.”

Transcript of Record, page 253.

This instruction was refused, and the defendants saved an exception.

Thus it will be seen that from the very start to the close of the case the defendant insisted upon the fact that the rules and regulations which were being introduced in evidence were not authorized by any provision of the Constitution of the United States. The same point was argued in the Court of Appeals and partially passed upon by that tribunal.

Thus Judge Thomson in his opinion says:

“The second provision undertakes to regulate the duties in relation to them of the persons by whom they might be removed

after their arrival in the State, and it is upon this provision that the plaintiffs' reliance is chiefly placed. After becoming domiciled within the State their management would be regulated by its laws, and not by the act of Congress. Any violation of the federal law in connection with the cattle would consist in their removal. The disposition of them afterwards was not within the scope of the statute."

Transcript of Record, page 8.

Even counsel for the plaintiffs in error in their petition for rehearing urged that one of the errors committed by the Court of Appeals was in construing the regulations of the Secretary of Agriculture as unwarranted by any act of Congress. And in their petition for a writ of error from the Court of Appeals to this court the same complaint is made. Thus, the eighth specification of errors set out in their petition is as follows:

"This court erred in holding and deciding that the rules and regulations promulgated by the secretary of agriculture on April 23, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the State laws, and not by the act of Congress, and that the disposition of said cattle afterwards were not within the scope of Federal authority."

Transcript of the Record, page 14.

Finally, the assignment of errors filed in this court, and upon which this argument is being had, renews this claim and repeats this identical language.

See the eighth assignment at page 18 of the Record. The record, therefore, shows that counsel for the defendant contended from the very beginning that certain proceedings adopted by the Secretary of Agriculture were contrary to any authority conferred upon the federal officers by the Constitution of the United States. Counsel for the plaintiffs contended that this power was granted by the Constitution of the United States, and insists that the Court of Appeals of Colorado decided this question against them. Not until preparing a brief for this court has any other thought ever passed through his mind. But now—too late—it is seen that it is absolutely essential to the case of plaintiffs in error that no constitutional question should be involved. The record is conclusive on this point.

As a matter of fact, any federal question necessary to maintain a writ of error from this court to a State court must necessarily involve a constitutional question. Any authority granted to this tribunal to take a case from the State courts must arise under the Constitution of the United States. Any law passed by an act of Congress must find its authority in the Constitution of the United States. Any case arising under the laws of the United States must arise under the Constitution, and any right claimed under a law of the United States is a right claimed under the Constitution of the United States. In the case at bar, however, the constitutional question was distinctly raised and insisted upon at all times.

The Supreme court of Colorado has said that whenever a constitutional question is involved in a case it can be brought to that tribunal for review. If the question is trivial, and evidently raised for the sole purpose of conferring jurisdiction upon that court, it would probably refuse to consider the case.

Trimble vs. People, 19 Colorado, 187.

Mackey vs. Tabor, 22 Colorado, 67.

Spangler vs. Greene, 21 Colorado, 505.

Hurd vs. Atkins, 21 Colorado, 259.

But who is to judge whether or not a constitutional question clearly existing in the record is raised for the sole purpose of conferring jurisdiction upon the Supreme Court? It was raised at the very beginning of the case, was never abandoned, and has been argued by both sides until this moment. Under the repeated decisions of this court, the Supreme Court of Colorado was the first tribunal to pass upon this question, and counsel for plaintiffs in error should have gone there before coming to this court. It is well settled that parties must make a *bona fide* attempt to have their case reviewed by every State tribunal that could possibly have jurisdiction before coming to this court.

McComb vs. Knox County, 91 U. S. 1.

Fisher vs. Perkins, 122 U. S. 522.

Great Western Tel. Co. vs. Burnham, 162 U. S. 339.

Bacon vs. Texas, 163 U. S. 207.

Levy vs. Superior Court, 167 U. S. 175.

The question raised was vital. No court can pass upon the whole case without considering it. The defendant below having won its case, an appellate court could of course affirm the judgment without necessarily deciding the ^{point} ~~case~~. But no judgment of reversal could be entered without first passing upon the question, and no intelligent opinion can be written on the entire case without giving it some attention. The question is therefore involved and necessary to a decision of the case. Not having

been passed upon by the Supreme Court of Colorado, the present case has no business in this court.

Second: Whatever Federal question there may be in the case has been decided in favor of the plaintiffs in error.

To maintain the jurisdiction of this court, it is necessary that the Federal question raised should be decided against the right claimed. Counsel has devoted the second head of his brief to a discussion of this question, resting his position solely on the opinion of the Court of Appeals. While wholly satisfied that this opinion is in itself entirely correct, we insist that the entire record shows beyond controversy that all rights claimed by plaintiffs under Federal authority were fully conceded to them. It is well settled that the opinion of an appellate court will not control the actual facts of a cause, but a still higher court will look at the entire record to see what rights were actually at issue and how they were finally determined.

Lake Shore R. R. vs. Hessier, 150 Ills. 546.

Marshall Nat'l Bank vs. Conniff, 151 Ills. 329.

Wheatland vs. Pryor, 133 New York, 97.

The reasoning even of an appellate tribunal is not ground for error, but the result accomplished by its decision, and to get at this result the entire record must be consulted.

Christy vs. Stafford, 123 Ills. 463.

Pennsylvania Co. vs. Keane, 143 Ills. 172.

The record shows that this suit was brought to recover damages for negligence alleged against the defendant. One of the grounds of negligence was

failure to comply with certain rules and regulations promulgated by the Secretary of Agriculture of the United States. The answer denied negligence, and also asserted a full compliance with all proper rules and regulations. On the trial the plaintiffs were permitted over the objections of the defendant to introduce the rules and regulations in evidence, and to show by all the testimony possible that they were not complied with. They were thus permitted to show that the United States authorities had made rules and that the defendant had failed to comply with them. So far no complaint can possibly be made.

The defendant, in its testimony, attempted to show that the rules and regulations introduced in evidence by the plaintiffs had been changed by the Secretary of Agriculture. This evidence was addressed to the court and not to the jury. The court was not convinced, and to prevent any misunderstanding the jury was informed explicitly that Secretary Rusk had not modified the particular paragraph of the regulations in controversy. Transcript of Record, page 257, folio 464.

The instruction on this point being as follows:

“ It is claimed on the part of the plaintiffs that the defendant violated this provision of this notice. It is claimed on the part of the defendant that prior to the shipment of the cattle the Secretary of Agriculture had modified this rule. I think the evidence, and I so charge you, fails to show that the Secretary of Agriculture had in a legal manner rescinded or abrogated the rule, so that this rule remained and was in force at the time that these cattle were landed at Iliff, in this State.”

So that, so far as the integrity of the regulations themselves was concerned, the plaintiffs had the full benefit of their enactment, of their introduction in

evidence, and of their violation, if they proved any. At the close of the evidence every point had been decided in their favor. When it came to instructions requested, given and refused, the situation, as shown by the record, was as follows:

The defendant requested the court to give a large number of instructions, among which were two framed to meet this issue; one, numbered 9, was, in substance, that the defendant had complied with all the rules and regulations made under the act of Congress; the other, numbered 10, was that Congress had no authority to pass the act authorizing the regulations. Both were refused and the defendant excepted.

The plaintiffs asked for instructions upon but four points, all told: first, that a failure to comply with paragraph 2 of the Rules and Regulations of the Department of Agriculture was negligence *per se*; second, a definition of reasonable care; third, that Secretary Rusk did not do away with or modify paragraph 2 of the Rules and Regulations; and fourth, upon the question of *scienter*. The last three were all given by the court. The first was given in modified form; that is, the court refused to instruct that a violation of the Rules and Regulations was negligence *per se*, but did say that the Rules and Regulations were sufficient to put the defendant upon inquiry, and were notice to it that the government of the United States was of the opinion that it was unsafe to ship cattle in violation of their terms. (Transcript of Record, pp. 257, 258.)

We contended that the court went beyond any rule of law in giving this instruction, but however that may be, the plaintiffs were satisfied with it, saved no exception, and permitted the case to go to the jury and be decided upon the record so made up.

On this point the Court of Appeals says:

“We are not at liberty to review the instructions because no proper objection was made to them when they were given.”

The rule invoked that a mere general exception to a general charge saves nothing has received the repeated sanction of the Supreme Court of Colorado and of this court.

Edwards vs. Smith, 16 Colorado, 529.

D. & R. G. R. R. Co. vs. Ryan, 17 Colorado, 98.

Block vs. Darling, 140 U. S. 234.

The right claimed under the Federal statute is thus decided in favor of the plaintiffs. The court permitted them to prove their regulations, that the defendant violated them, and instructed the jury that this is an element of negligence. No right has been denied. It is true that the full claim of plaintiffs that violation of the regulations is negligence *per se* has not been conceded, but this modification of the court is consented to by the plaintiffs. No exceptions were saved to the instructions given. They accept thereby the view of the court and make its position their position. The only right claimed by them under the Federal statutes is that stated in the court's instructions, and this is decided in their favor.

The only possible Federal question that can exist in the case is the modification by the court of the first request made by counsel for the plaintiffs. This request was that the court should instruct absolutely that a violation of these rules and regulations was negligence *per se*. The court instructed that such a violation would simply be evidence of negligence, to be considered by the jury together with all other evi-

dence in the case. Under the decisions of this court and of all courts, unless an exception is saved to a modification of an instruction requested, the party waives any exception which he might take to the request itself.

We may illustrate our point in this way. At the conclusion of the evidence counsel for plaintiffs says to the court, "We ask your Honor to instruct upon these points as follows."

The court replies, "I do not believe that under the law and the evidence I would be justified in giving such instructions, but I will modify them to this extent and so instruct."

Counsel then listens to the instructions given and says, "Very well, we are satisfied with the instructions given by your Honor."

Is not this a complete waiver of any claim that the court erred in refusing the previous request? It has been practically so held by this court and the Court of Appeals of New York.

Beaver vs. Taylor, 93 U. S. 46.

Ayrault vs. Pacific Bank, 47 N. Y. 570.

Walsh vs. Kelly, 50 N. Y. 556.

Requa vs. City of Rochester, 45 N. Y. 129.

It follows that the only possible Federal question in the case was decided as the plaintiffs wished it to be decided. No right, privilege or immunity claimed by them was denied. This court, therefore, has no jurisdiction to review the judgment of the Colorado Court of Appeals.

Ryan vs. Thomas, 4 Wallace, 603.

Carpenter vs. Williams, 9 Wallace, 785.

Missouri vs. Andriano, 138 U. S. 496.

Argument Upon Main Case.

The question for discussion under this head is whether or not the action of the Court of Appeals in affirming the judgment of the lower court is correct. Counsel for plaintiffs in error base their entire argument upon the language of the Court of Appeals in deciding the case. We desire to base our entire argument upon the record as a whole. We are entirely satisfied with the opinion itself, and believe that this court will say, if it becomes necessary, that it states the law. But the decision could have rested upon several other grounds and reached the same result. As already seen, the complaint charges the defendant company with negligence in shipping certain cattle from Kimble county, Texas, to Logan county, Colorado. It is ambiguous and uncertain as to just what ground of negligence is alleged against the defendant, but seems to attempt to set forth two grounds: first, negligence generally, in knowingly shipping cattle that were liable to impart the Texas fever; and, second, in shipping cattle in violation of the quarantine regulations of the State of Colorado as lawfully established for the year 1891, and in violation of the regulations of the United States Department of Agriculture, lawfully established under and by virtue of the acts of Congress for that purpose passed. The defendant is then charged with permitting these cattle to run at large upon the public range so that they came in contact with cattle of the plaintiffs, giving them Texas fever, from which a large number died, and the plaintiffs were damaged.

Transcript of the Record, pages 23 to 27.

A demurrer to the complaint was overruled, and the defendant company answered denying any negligence on its part and averring a full compliance with all lawful sanitary rules and regulations. By an

amendment to the complaint filed shortly before the trial, the negligence of the defendant in violating the rules and regulations of the Department of Agriculture was attempted to be set out more specifically.

Transcript of the Record, page 35.

But the court will see that while most of the evidence that was introduced was upon the theory that the defendant was mainly guilty of negligence in violating the quarantine rules and regulations, that the case was also tried upon the theory of negligence generally in the defendant permitting its diseased cattle to come in contact with healthy cattle of the plaintiffs.

The case was tried in September, 1894. At the opening of the case the defendant objected to the introduction of any evidence, for the reason that the complaint did not state facts sufficient to constitute a cause of action under the common law rule of negligence, and did not aver specifically any breach of rules and regulations made by the State or national authorities. This objection was overruled, and the defendant then asked that the plaintiffs be compelled to elect upon which theory they would proceed, whether for the violation of the common law rules of negligence, or for violation of statutory provisions. This motion was denied. The plaintiffs then offered in evidence the rules and regulations of the Department of Agriculture, which were objected to by the defendant, upon the ground that they were not authorized by the act of Congress, and if authorized, the act itself was unconstitutional and void. The objection was overruled and the rules and regulations introduced in evidence. The case was then tried for eight successive days, and a large amount of evidence introduced on both sides. The plaintiffs were permitted to introduce testimony tending to show not only common law negligence, but to prove the

existence of the rules and regulations of the Department of Agriculture and claim a violation of the same. The defendant introduced a mass of testimony showing that it had not been guilty of any common law negligence, that it had fully complied with all the State quarantine regulations, and that Secretary Rusk had modified the rules and regulations introduced in evidence by the plaintiffs. At the close of all this testimony the jury was instructed upon the law, certain instructions asked by the plaintiffs and defendant were refused, the jury retired, and brought in a verdict for the defendant. The Court of Appeals decides that under the practice in Colorado no sufficient exceptions were saved to the instructions given, and that the plaintiffs have no ground upon which any error can be predicated so far as the instructions to the jury are concerned. So far as any exceptions to the introduction of evidence ^{are} ~~is~~ concerned, none appear by the printed transcript, and none are urged by the plaintiffs in error before this court. So that we have this extraordinary condition of affairs: the plaintiffs are permitted to introduce whatever evidence they see fit, have no fault to find with the rulings of the court on the evidence of the defendant, and save no exceptions to the instructions of the court to the jury.

We confess that we are unable to see what remaining error can be urged before this court. If all the evidence was properly admitted and the jury properly instructed upon the law, what error can possibly exist to justify a reversal? But counsel say that an intermediate appellate court, in an opinion passing upon this evidence and passing upon those instructions, announced certain propositions of law that are not correct. We might concede this to be true and, at the same time, insist that the judgment should be affirmed. If, as a matter of fact, the actual

judgment in the case was reached without error, then any mere language used by the Court of Appeals concerning the record would be wholly immaterial and no ground whatever for reversing the original judgment by reversing that of the Court of Appeals.

The only error that we understand is discussed or claimed by counsel for plaintiffs in error relates to a part of the instructions given by the court below, and which is set out on pages 5 and 6 of their brief. As no exception was saved to this instruction, no error can be predicated upon it. For this reason alone we think that the judgment of the court below must necessarily be affirmed by this court.

But in addition to all this, the opinion of the Court of Appeals clearly states the law. This opinion will be found in the record beginning on page 3 and ending on page 9. It construes the act of Congress of May 29, 1884, entitled "An Act for the Establishment of the Bureau of Animal Industry, etc." This act will be found in the 23 Statutes at Large, page 31. It consists of eleven sections. The first section creates the Bureau of Animal Industry, whose duty it is to investigate and report upon the condition of domestic animals in the United States. Section 2 provides for the appointment of agents by the commissioner of agriculture, whose duty it shall be to examine and report upon the best methods of treating, transporting and caring for animals infected with certain diseases. Section 3 provides as follows:

"That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Terri-

tory, and invite said authorities to co-operate in the execution and enforcement of this act.

“ Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuropneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State, or other properly constituted authorities, signify their readiness to co-operate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.”

Section 4 provides that the Commissioner of Agriculture shall make investigations as to certain diseases of animals. Section 5 provides that the Secretary of the Treasury shall adopt measures to prevent diseased animals from being exported abroad. Section 6 prohibits railroad companies from transporting diseased animals, and that no person shall transport such diseased animals from one State to another.

Section 7 is as follows:

“ That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company

duing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion;

“And any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.”

Section 8 provides for the suppression of contagious diseases among cattle in the District of Columbia. Section 9 provides that the United States attorney shall prosecute all violations of the act. Section 10 contained an appropriation. Section 11 closes the act with a provision for an annual report.

Under this law and the supplementary statute passed in 1890, the Secretary of Agriculture, on the fifth day of February, 1891, promulgated certain rules and regulations for that year, which on the twenty-third day of April were amended, or rather added to, by certain additional provisions. The Court of Appeals of Colorado, in construing these rules and regulations of the Secretary, held that they had not been issued in compliance with the act of Congress. The rules and regulations purport to be issued in accordance with section 7. An examination of the section will show that no authority is given to make rules and regulations of any kind, nature or description, but simply to give notice to railroad companies and others engaged in interstate traffic. The only authority to make rules and regulations

will be found in section 3, and it is there provided that any made can only have force or effect after they are adopted and agreed to by State authorities. And so careful was Congress that it is only after the rules and regulations have been agreed to by State authorities, that the Commissioner of Agriculture is authorized to take any measures whatever to prevent the spread of the disease from one State or Territory into another. Section 6 prohibits any person from driving diseased cattle from one State to another. As such, it undoubtedly comes within the power of the general government to regulate interstate commerce; and with section 5 it is probably the only portion of the act that is clearly within the authority of Congress. Neither 5 nor 6 has anything to do with the case at bar.

The rules and regulations expressly state that they are based on section 7 of the act. We do not know that we can add anything to the reasoning of the Court of Appeals upon these matters, and we ask this court carefully to consider the opinion of that court. We believe that it will agree fully with the exposition of the law there found. No attempt was made at the trial to show that these rules and regulations had ever been agreed to by the State authorities of either Colorado or Texas. No compliance was shown or attempted with any of the provisions of section 3 of the act in question as to securing the concurrence of the State authorities. The rules and regulations themselves state that they are conditioned upon the consent of certain State authorities, and no attempt was made to show that those State authorities had ever agreed to these conditions. So far as sections 3 and 7 are concerned, the one never authorized any rules and the other was never complied with.

We find some difficulty in following the argument of counsel on this branch of the case. It is claimed that section 3 authorized the rules of April 23, but these rules require the consent of the State authorities, and no consent being shown, it is then contended that the rules of February 5 were left in full force and effect. But we submit that a party could not under any rule of law be charged with negligence for violating a regulation which the power making had afterwards done away with. No authorities are cited that in any way impeach the reasoning of the Court of Appeals or support the position urged by counsel.

There are two phases of the case upon which we wish to say a few words: First, whether or not the jury should have been instructed that the violation of these rules and regulations was negligence in itself, or simply evidence of negligence which should go to the jury in connection with all the other facts and circumstances of the case; and, second, whether the particular regulation which these defendants are charged with violating was authorized by the act of Congress, or whether any act of Congress authorizing such a regulation would be constitutional and valid. Upon the first of these points the record shows that counsel for the plaintiffs asked for a peremptory instruction to the effect that a violation of these regulations was negligence in itself, that this was refused, and the court instructed that the regulations themselves were simply notice to the defendant. That is to say, a violation of the regulations would simply be evidence of negligence. As no exception was saved to the instruction, no question upon this point is really in the case, but whether an exception was saved or not, the instruction was clearly right. This court has already decided, after

full argument, that the act creating the Bureau of Animal Industry was not intended to establish civil liabilities between private parties.

Missouri, Kansas & Texas Ry. Co. vs.
Haber, 169 U. S. 615.

That case also sustains the construction of the Court of Appeals that the Commissioner of Agriculture had no authority to act without the co-operation of the States themselves.

Rules of this kind, with no penalty for their violation, cannot have the effect of statutes and subject parties to liability for their violation irrespective of the question of due care. No case can be found in the books to sustain the position of counsel for plaintiffs in error.

The vice of the instruction requested and the correctness of the rule of law laid down by the court is shown by the decisions of this court. In passing upon a municipal ordinance that created a duty, the court says:

“In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence.”

Hayes vs. Michigan Central Rd., 111 U.
S. 228.

Union Pacific Rd. Co. vs. McDonald, 152
U. S. 262.

See also—

Knupfle vs. Knickerbocker Ins. Co., 84
N. Y. 488.

Many questions suggest themselves and might be urged upon this branch of the case. We might enter upon a lengthy discussion of the maze of cases clustered about the doctrine of proximate cause, and show that a violation of these rules was not the cause of the injuries complained of, or we might challenge the ground that this statute was ever intended to cast any duty whatever upon individuals that does not exist at common law. But it is not necessary. The instruction asked for is not supported by any authority; the instruction given was not excepted to. No other matter is open to discussion.

Second: The particular regulation which is charged to have been violated was never authorized by the act of Congress itself, and if authorized would be unconstitutional and void. This case hinges upon clause 2 of the regulations of April 23, 1891. These regulations permitted cattle to be taken from certain districts in Texas to the States of Colorado, Wyoming and Montana, for grazing purposes. Said cattle were to go under certain conditions. The first and second of these were as follows:

(1) That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the first day of December, 1891.

(2) That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

It is this second provision which the defendant is charged with violating. It is claimed that it permitted cattle shipped from Texas to Colorado to come in contact with cattle going to the eastern markets before December 1, 1891. It will be noted that these regulations permit cattle to be shipped into Colorado for grazing purposes, *and attempt to provide how said cattle shall be grazed after arriving in Colorado.* No authority will be found in the act itself for any such provision as this, unless it be in the first three sections, and if given there, it is clearly beyond the scope of any grant of power contained in the Constitution of the United States to Congress. Congress had plenary authority to regulate commerce between the several States, but it has no authority whatever to regulate the industrial affairs or any products which are solely within the jurisdiction of the particular States. In other words, Congress may regulate the shipment of cattle from one State to another, but cannot regulate or provide what shall be done with cattle after the shipment is complete. It might as well be urged that Congress had the right to provide how cattle should be raised, how they should be fed, in what condition they should be kept, how they should be slaughtered, for what price the beef should be sold, and how it should be cooked before eating. If no power exists to do this, neither does it exist to say to a person, you may ship your cattle from Texas to Colorado, but after they have arrived in Colorado you must graze and feed them in a particular way. If Congress can say that cattle shall be cared for in a certain way from April to December of any year, it has the right to say they shall be cared for in a certain way for an indefinite period. Congress itself, in passing this act, seems to have realized the limitations placed upon its power by the Constitution, and all the way

through we find that everything to be done must be with the consent of the State authorities.

This court has stated principles in a number of cases that are conclusive of this proposition. It is not necessary to go into them at length. The line between Federal authority over the productions and manufacturing industries of the State, and interstate commerce, was clearly and distinctly drawn in what is commonly known as the Sugar Trust case, and reported under the title of *The United States vs. Knight*, 156 U. S. 1. The principles announced in other cases are equally conclusive.

Kidd vs. Pearson, 128 U. S. 1.

Leisy vs. Hardin, 135 U. S. 100.

We might also call the attention of the court to the fact that such eminent authority as Judge Thompson has doubted the right of Congress to create a department of agriculture under any circumstances, and it would seem that the doubts suggested by Judge Thompson are well founded. Agriculture is peculiarly a matter within the control of the several States, the same as manufacturing, mining and the other great industries of the country. Congress has no authority over them except as they begin to move from one State into another. Its authority ceases when they reach the other State and become mingled with the mass of property located therein. While in transit from one State to another, Congress has full authority to act, but beyond this it has no authority whatever.

Judge Thompson's closing paragraph is as follows:

“But even under our liberal theory of interpretation, we doubt whether any warrant can be found in the instrument for the creation of the Department of Agriculture. This

subject could solely be dealt with, and is dealt with, by the respective States, for their own inhabitants and their own purposes. There is no reason, such as existed in the case of the Louisiana Lottery, and such as still exists in the case of the Sugar Trust, and the Railroad Trust, and of many other trusts, demanding the interference of the general government. To support such congressional action requires even a larger interpretation of the general welfare clause than we have been disposed to give it. But if such an interpretation could fairly be found in the instrument, we are in favor of finding it. The power to establish a Department of Commerce in the President's cabinet seems to have been clearly conferred upon Congress in the power to regulate commerce between the State and with foreign countries."

30 Am. Law Review, 790.

We do not think it necessary for this court to pass upon this point. It must, we are satisfied, dismiss the writ of error for the reasons given. In case we are mistaken on this point, then it will be found that the decision of the Court of Appeals is correct; and only after all these other questions are disposed of will it be necessary to inquire into the powers of Congress. If finally compelled to test them, however, it will be found not to extend to this particular regulation.

Respectfully submitted,

C. S. THOMAS,
W. W. BRYANT,

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Attorneys for Plaintiffs in Error.

No. 153.

Add^d: *By* of Thomas *Argant for*
IN THE D. C.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 20, 1899.
No. 153.

J. K. MULLEN AND C. D. MCPHEE, PLAINTIFFS IN
ERROR,

vs.

THE WESTERN UNION BEEF COMPANY,
DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

We simply desire to call attention to two or three additional cases.

On our motion to dismiss because the plaintiffs in error did not first go to the supreme court of Colorado, little need be said. The point is made that the supreme court of Colorado has decided that it will, under some circumstances, refuse to entertain jurisdiction, even though a constitutional question may be involved; that is, the court will inquire into the question of whether the constitutional question is

necessary to a decision. But who is to decide this point—this court or the supreme court of Colorado? We contend that the Colorado court must first pass upon it. The plaintiffs in error must exhaust all their remedies in Colorado before coming here.

On the ground that the Federal question involved must be decided against the complaining party, we desire to call attention to—

Laclede Gas Light Co. vs. Murphy, 170 U. S., 78.

This court there refused to review the decision of the supreme court of Missouri because whatever Federal question was involved had been decided in favor of the party coming to this court. We have shown in our former brief that this is what happened in the case at bar. The trial court actually decided every point raised on the act of Congress in favor of the plaintiffs.

On the merits of the controversy, as we term them, we desire to cite—

Rhodes vs. Iowa, 170 U. S., 412.

This case is a good illustration of the point we are contending for. The court squarely holds that the very moment property moving from one State into another has reached its destination and become mingled with the general mass of property in the new State it ceases to be under the control of Congress. The court divided on the question as to what moment of time the journey ended. Justices Gray, Harlan, and Brown thought that the moment the property was unloaded from the vehicle in which it was being conveyed it became a part of the property of the State. The other judges were of opinion that the property had first to

be delivered to the consignee and he had had an opportunity to dispose of it.

In the case at bar the decision of the majority is sufficient. The cattle in controversy had completed their journey beyond question, and yet it is contended they were still subject to regulation by Congress, and must be herded and cared for in accordance therewith.

We submit, the case must be dismissed and affirmed.

C. S. THOMAS,

W. H. BRYANT,

H. H. LEE,

Attorneys for Defendant in Error.

Statement of the Case.

MULLEN *v.* WESTERN UNION BEEF COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF COLORADO.

No. 153. Argued and submitted January 18, 1899. — Decided February 20, 1899.

On the facts stated by the court in its opinion, it declines to hold that it affirmatively appears from the record that a decision could not have been had in the Supreme Court of the State, which is the highest court in the State; and this being so, it holds that the writ of error must be dismissed.

THIS was an action brought by Mullen and McPhee against the Western Union Beef Company, in the district court of Arapahoe County, Colorado, to recover damages for loss of stock occasioned by the communication from cattle of defendant to cattle of plaintiffs of the disease known as splenetic or Texas fever, by the importation into Colorado of a herd of Texas cattle, in June, 1891, and suffering them to go at large, in violation of the quarantine rules, regulations and orders of the United States Department of Agriculture, in accordance with the act of Congress approved May 29, 1884, c. 60, entitled "An act for the establishment of a Bureau of Animal Industry, etc.," 23 Stat. 31; and the act approved July 14, 1890, c. 707, 26 Stat. 287; and in violation of the quarantine rules and regulations of the State of Colorado. The trial resulted in a verdict for defendant, on which judgment was entered. Plaintiffs sued out a writ of error from the Court of Appeals of the State of Colorado and the judgment was affirmed, whereupon the present writ of error was allowed.

The Court of Appeals held that the question of violation by defendant of the quarantine rules and regulations of the State need not be considered because "upon sufficient evidence, it was settled by the jury in defendant's favor;" that "no question of negligence generally in the shipment and management of the cattle is presented by the record;" and that the theory on which the case had been tried below and was argued in that court was that "if the loss of the plaintiffs'

Statement of the Case.

cattle was in consequence of disease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe."

The regulations of the Secretary of Agriculture were as follows:

"Regulations Concerning Cattle Transportation.

"UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February 5, 1891.*

"To the managers and agents of railroad and transportation companies of the United States, stockmen and others:

"In accordance with section 7 of the act of Congress approved May 29, 1884, entitled 'An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and of the act of Congress approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1891, you are notified that a contagious and infectious disease known as splenic or southern fever exists among cattle in the following-described area of the United States: . . . From the 15th day of February to the 1st day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations."

[Here followed a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts.]

"UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April 23, 1891.*

"Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described

Statement of the Case.

may be moved from said area by rail into the States of Colorado, Wyoming and Montana for grazing purposes, in accordance with the regulations made by said States for the admission of southern cattle thereto.

“Provided :

“1. That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1891.

“2. That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

“3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5, 1891.

“4. That the state authorities of the States of Colorado, Wyoming and Montana agree to enforce these provisions.”

The court, after stating that the territory described in both orders included that from which the defendant's cattle were shipped, said : “It is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which were claimed to have been violated by the defendant.”

And it was then ruled that the regulations were not binding, as it was not shown that the State had agreed to them ; that they were not authorized by the statute ; that “the second provision undertakes to regulate the duties in relation to them [the cattle], of the persons by whom they might be removed after their arrival in the State, and it is upon this provision that plaintiffs' reliance is chiefly placed. After becoming domiciled within the State their management would be regulated by its laws and not by the act of Congress. Any violation of the Federal law in connection with the cattle would consist in their removal. The disposition of them after-

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wards was not within the scope of the statute." 9 Colorado, 497. 49 Pac. Rep. 425.

Mr. T. B. Stuart for plaintiffs in error. *Mr. W. C. Kingsley* filed briefs for the same.

Mr. C. S. Thomas and *Mr. W. H. Bryant* for defendant in error submitted on their brief, on which was also *Mr. H. H. Lee*.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

We are met on the threshold by the objection that the writ of error runs to the judgment of the Court of Appeals, and cannot be maintained, because that is not the judgment of the highest court of the State in which a decision could be had.

The Supreme Court of Colorado is the highest court of the State, and the Court of Appeals is an intermediate court, created by an act approved April 6, 1891, (Sess. Laws, Col. 1891, 118,) of which the following are sections:

"SECTION 1. No writ of error from, or appeal to, the Supreme Court shall lie to review the final judgment of any inferior court, unless the judgment, or in replevin, the value found exceeds two thousand five hundred dollars, exclusive of costs. *Provided*, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the State or of the United States is necessary to the determination of a case. *Provided, further*, that the foregoing limitation shall not apply to writs of error to county courts."

"SECTION 4. That the said court shall have jurisdiction:

"*First*—To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"*Second*—It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars, or less, exclusive of costs.

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"*Third* — It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State, or of the United States, is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the Court of Appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the Supreme Court."

The Supreme Court of Colorado has held in respect of its jurisdiction under these sections, that whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error from that court will lie; that "it matters but little how such question is raised whether by the pleadings, by objections to evidence or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it;" but "it must fairly appear from an examination of the record that a decision of such question is necessary, and also that the question raised is fairly debatable," *Trimble v. People*, 19 Colorado, 187; and also that "when it appears by the record that a case might well have been disposed of without construing a constitutional provision, a construction of such provision is not so necessary to a determination of the case as to give this court jurisdiction to review upon that ground," *Arapahoe County v. Board of Equalization*, 23 Colorado, 137; and, again, that "unless a constitutional question is fairly debatable, and has been properly raised, and is necessary to the determination of the particular controversy, appellate jurisdiction upon that ground does not exist." *Madden v. Day*, 24 Colorado, 418.

This record discloses that defendant insisted throughout the trial that the acts of Congress relied on by plaintiffs were unconstitutional if construed as authorizing the particular regulations issued by the Secretary.

When plaintiffs offered the rules and regulations in evidence, which they contended defendant had violated, defend-

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ant objected to their admission on the two grounds that they were not authorized by the acts of Congress, and that, if they were, such acts were unconstitutional. The objection was overruled and defendant excepted.

The regulations having been introduced in evidence, plaintiffs called as a witness, among others, a special agent of the Department of Agriculture, who was questioned in respect of their violation, to which defendant objected and excepted on the same grounds.

At the conclusion of plaintiffs' case, a motion for non-suit was made by defendant, the unconstitutionality of the acts under which the regulations were made being again urged, and an exception taken to the denial of the motion.

The trial then proceeded, and, at its close, defendant requested the court to give this instruction: "The court instructs the jury that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated, are not authorized by the Constitution of the United States, and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not, of itself, be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

This instruction was objected to and was not given, though no exception appears to have been thereupon preserved.

On behalf of plaintiffs the court was asked to instruct the jury as follows:

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph two of the rules and regulations of the United States Department of Agriculture of April 23, 1891, and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, then that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defendant did

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not use reasonable care in this case, and that the defendant was guilty of negligence."

This was refused by the court and plaintiffs excepted. But the court charged the jury that the rule promulgated by the Secretary of Agriculture "would have the effect to give to this defendant notice that the United States authorities having in charge the animal industries, so far as the Government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble County at that period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to co-mingle with them." To this modification of the instruction requested plaintiffs saved no specific exception.

After the affirmance of the judgment by the Court of Appeals, plaintiffs filed a petition for a rehearing, the eighth specification of which was that —

"This court erred in holding and deciding that the rules and regulations promulgated by the Secretary of Agriculture on April 23, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the state laws, and not by the act of Congress, and that the disposition of said cattle afterwards was not within the scope of Federal authority."

It thus appears that if the trial court and the Court of Appeals had been of the opinion that the Secretary's rules and regulations were within the terms of the authority conferred by the statutes, and that non-compliance therewith would have constituted negligence *per se*, those courts would have been necessarily compelled to pass upon the constitutionality of the acts, which question was sharply presented by defendant. And it is also obvious that if the Supreme Court had been applied to and granted a writ of error, and that court had differed with the conclusions of the Court of Appeals, arrived at apart from constitutional objections, the validity of the acts and regulations would have been considered.

Syllabus.

The Court of Appeals seems to have been of opinion that after the cattle arrived in Colorado, Congress had no power to regulate their disposition, and hence that the regulations were not binding. And the question of power involved the construction of a provision of the Constitution of the United States. At the same time its judgment may fairly be said to have rested on the view that the statutes did not assert the authority of the United States, but conceded that of the State, in this regard; and that the regulations were not within the terms of the statutes. But, if the case had reached the Supreme Court, that tribunal might have ruled that the judgment could not be sustained on these grounds, and then have considered the grave constitutional question thereupon arising.

And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.

We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the State, and, this being so, the writ of error cannot be sustained. *Fisher v. Perkins*, 122 U. S. 522.

Writ of error dismissed.